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No. 12914

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United States  
Court of Appeals

For the Ninth Circuit.

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C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellant,

vs.

KATHLEEN HUTCHENS,

Appellee.

KATHLEEN HUTCHENS,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellee.

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Transcript of Record

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Appeals from the United States District Court,  
for the District of Oregon.



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for the District of Oregon.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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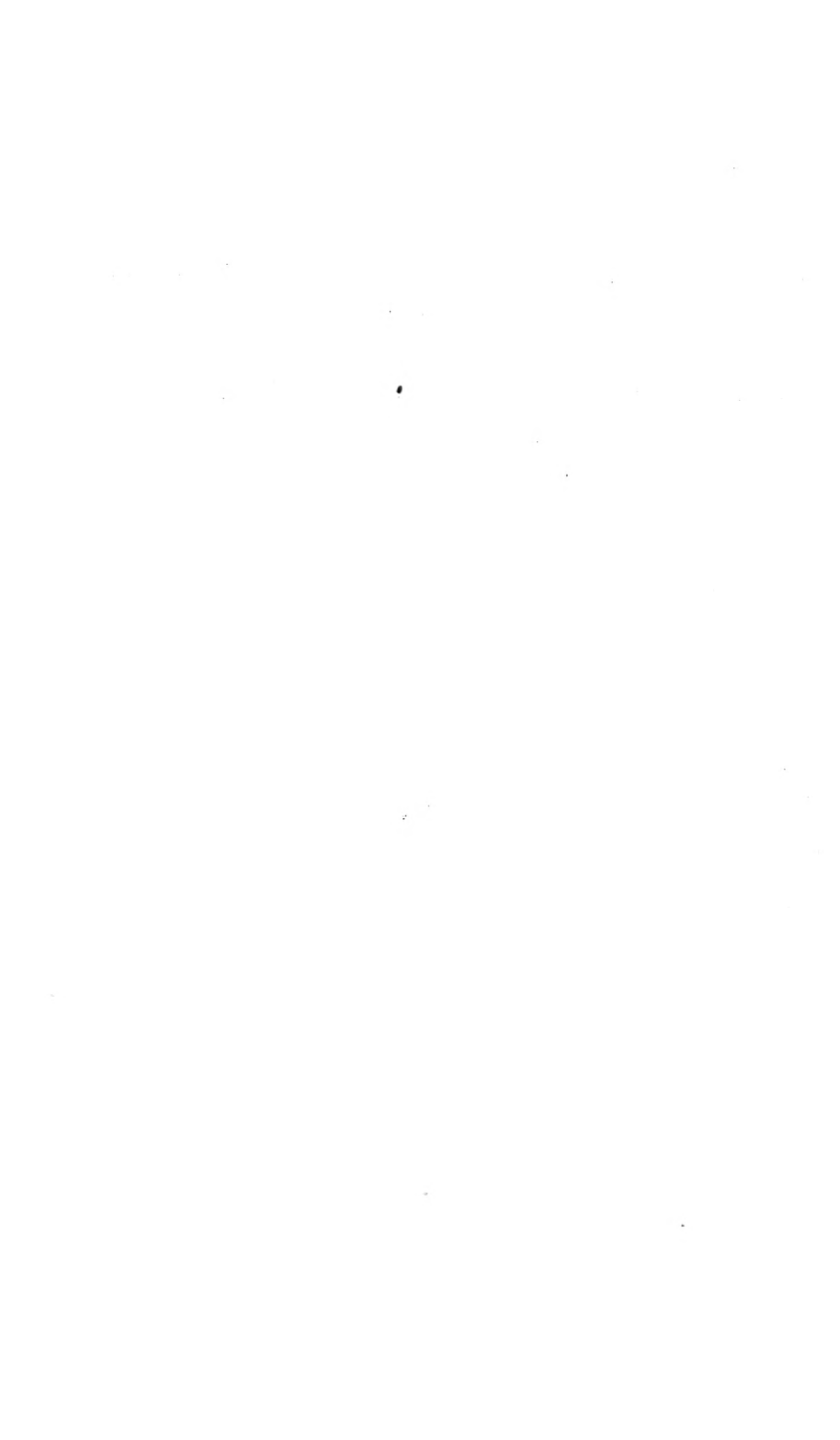
NAMES AND ADDRESSES OF ATTORNEYS  
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For Appellee.





In the United States District Court for the  
District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation.

Defendant and  
Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

NOTICE TO STATE INDUSTRIAL ACCIDENT  
COMMISSION

To the State Industrial Accident Commission of the  
State of Oregon:

You are hereby notified that the above-named plaintiff has commenced an action against the above-named defendant in the United States District Court for the District of Oregon, the complaint in said action being filed on the 29th day of September, 1949.

This notice is given to you pursuant to the provisions of Section 102-1729, O.C.L.A.

/s/ HARRY GEORGE, JR.,

Of Attorneys for Plaintiff.

State of Oregon,  
County of Marion—ss.

Service of the foregoing notice on the State Industrial Accident Commission is accepted in Salem, Marion County, Oregon.

/s/ PAUL E. GURSKE,  
Commissioner.

Claim No: Claim No. Pending  
Name: Hollis Dean Hutchens

Received January 3, 1950.

[Endorsed]: Filed January 11, 1950.

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[Title of District Court and Cause.]

### MOTION FOR SEPARATE TRIALS

Comes now William A. Babcock, attorney for plaintiff, and moves the Court for an order providing for separate pre-trial conferences, pre-trial orders and separate trials in the principal action and in the third-party action in the above-entitled causes and in support thereof represents and alleges as follows:

The principal action is an action founded in tort and brought under the Employers Liability Act of the State of Oregon for damages for the death of plaintiff's husband which allegedly resulted from the negligence of the defendant C. D. Johnson Lumber Corporation. Timely request for trial by jury was made in said action and answer to the com-

plaint has been filed by the defendant C. D. Johnson Lumber Corporation but no answer or counterclaim or cross-claim has been filed to the complaint by the third-party defendant, William R. Francis. The plaintiff has asserted no claim against the third-party defendant, William R. Francis.

The third-party complaint is based on a claim under an alleged contract between the third-party plaintiff, C. D. Johnson Lumber Corporation, and the third-party defendant, William R. Francis, under which it is alleged the third-party defendant is bound to indemnify or save harmless the third-party plaintiff for any damages it sustains because of the claim in the principal action.

An answer has been filed to the third-party complaint by the third-party defendant. More than ten days have elapsed since answer was filed and no request for trial by jury in the third-party action has been made by either party.

The evidence which will be introduced and the witnesses which will be called in the principal action are for the most part different than in the third-party action.

The trial of the third-party action with the principal action would tend to unduly complicate and confuse the issues in the principal action and the presentation of the evidence, and would prejudice the claim of the plaintiff against the defendant C. D. Johnson Lumber Corporation.

It will be more convenient for the principal action and the third-party action to be separately tried

and to have separate pre-trial conferences and separate pre-trial orders made.

Wherefore plaintiff prays that orders be entered, that separate pre-trial conferences be held, that separate pre-trial orders be made and that separate trials be held in the principal action and in the third-party action.

Dated this 19th day of January, 1950.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

I, William A. Babcock, hereby certify that I am attorney of record for plaintiff herein and that I served a true copy of the foregoing motion for separate trials upon James Arthur Powers, attorney for defendant, C. D. Johnson Lumber Corporation, and Hugh L. Biggs and Karl T. Huston, attorneys for third-party defendant, William R. Francis, on the 20th day of January, 1950, by depositing such true copies in the United States Post Office, Portland, Oregon, sealed in envelopes with postage fully prepaid thereon and addressed to the proper addresses of said attorneys.

Dated January 20, 1950.

/s/ WM. A. BABCOCK,  
Attorney for Plaintiff.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

MOTION

Comes now defendant C. D. Johnson Lumber Corporation and moves the Court for an order requiring plaintiff to elect as to whether she will proceed on the theory that the deceased was an employee of Third-Party Defendant William R. Francis or an employee of Defendant C. D. Johnson Lumber Corporation. Under the contentions now made by plaintiff the position appears to be that the deceased was jointly employed by both of the aforesaid employers. That this defendant is entitled to know which theory plaintiff will proceed upon in order to present to the Court legal objections in advance of the trial. It is the theory of this defendant that plaintiff seeks to recover on a basis of joint employment of the deceased by both employers; that the action under the Oregon Statutes cannot be maintained.

KING, WOOD, MILLER  
& ANDERSON

/s/ JAMES ARTHUR POWERS,  
Of Attorneys for Defendant and Third-Party Plaintiff,  
C. D. Johnson Lbr. Corp.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 9, 1950.

[Title of District Court and Cause.]

ORDER JUNE 14, 1950

Plaintiff appearing by Mr. William A. Babcock and Mr. Emerson Sims, of counsel, and the defendant by Mr. James Arthur Powers, of counsel.

It Is Ordered that Mr. Cleveland C. Corey, be, and is hereby, permitted to appear specially in this cause, on behalf of the defendant, pending his general admission to the bar of this court. Further pre-trial conference had.

It Is Ordered that the issues between plaintiff and defendant be segregated and that the issues between defendant and third-party defendant be reserved for later disposition.

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[Title of District Court and Cause.]

PRE-TRIAL ORDER

On May 22, 1950, a pre-trial conference was held in open Court, the Honorable Gus J. Solomon, Judge of this Court, presiding. The plaintiff appeared by her counsel, William A. Babcock and Emerson Sims; the defendant, C. D. Johnson Lumber Corporation, appeared by one of its attorneys, James Arthur Powers (James Arthur Powers and Earle P. Skow, King, Wood, Miller and Anderson), and the third-party defendant appeared by one of his attorneys, Hugh L. Biggs (Hart, Spencer, McCulloch, Rockwood and Davies, and Karl T. Huston).

Agreed Statement of Facts Between Plaintiff and  
Defendant, C. D. Johnson Lumber Corporation

I.

Plaintiff is a citizen of the State of Oregon. Defendant, C. D. Johnson Lumber Corporation, is a corporation duly organized and existing under the laws of the State of Nevada and is doing business in the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

Plaintiff was the wife of Dean Hutchens. Dean Hutchens died on August 19, 1949, leaving plaintiff as his widow and leaving no children.

III.

At all times herein involved, defendant, C. D. Johnson Lumber Corporation, was engaged in operating a sawmill and other facilities at Toledo, Oregon. In connection with its sawmill, the defendant owned and maintained a dock and log unloading dump located on the Yaquina River. On the edge of the dock were located three brow logs used in connection with the unloading of trucks and a movable lifting crane consisting of a converted Marion type shovel which was moved from one brow log to the other to unload the logs off the trucks. The brow log farthest from the approach to the dock was the one in use at the time of the accident herein involved.

The usual process in unloading a truck was as follows: One end of a sling line was anchored to the



brow log and the other end left free. Log trucks were driven to a place alongside the brow log being used and spotted in position by a signal from the crane engineer. In unloading the trucks the truck driver took the free end of the sling line and placed it under the logs to be unloaded, then attached it to the lifting crane. When the line was so attached, the engineer operating the crane took the slack out of the line. The truck driver then made his load ready for dumping and gave a signal to the crane engineer to hoist the log.

#### IV.

On August 19, 1949, the deceased, Dean Hutchens, was the driver of a logging truck delivering logs to said dock and was engaged in log unloading operations near said brow log. The truck being unloaded consisted of one large log approximately 40 feet long and 52 inches in diameter. Dean Hutchens spotted the truck under the unloading dump at a point indicated by the crane engineer. He thereupon got out of the truck and pulled the sling line over the reach and under the log and fastened the end of it to the hook on the unloading crane. Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log.

#### V.

The deceased was on premises owned by the C. D. Johnson Lumber Corporation at the time of the accident and his death.

VI.

The deceased was born on June 22, 1928. At the time of his death deceased was an able-bodied workman with a life expectancy of forty-four years under standard mortality rates.

VII.

At the time of the accident and death, the truck being operated by deceased was the only truck on the premises being unloaded.

VIII.

The decedent, Dean Hutchens, was the registered owner of the truck he was operating.

IX.

The defendant, C. D. Johnson Lumber Corporation, owned and maintained the unloading dock and the unloading crane and brow logs used there for the unloading of trucks.

X.

It is admitted that plaintiff bases her cause of action and right to recover solely under the Oregon Employer's Liability Act.

Disputed Issues of Fact

Contentions of Plaintiff

I.

The decedent, Dean Hutchens, at the time and place he received his fatal injuries, was in the service and employment of W. R. Francis as a log truck

driver hauling logs for W. R. Francis to the unloading dock of the defendant, C. D. Johnson Lumber Corporation, and as a part of such employment was assigned by his employer to assist in the unloading of the truck at said unloading dock. Decedent was engaged in such work under the following circumstances:

(1) W. R. Francis had a contract with the defendant, C. D. Johnson Lumber Corporation, to log certain timber belonging to the said defendant, and to deliver it by truck to the dock of the defendant at Toledo at an agreed rate per thousand board feet of logs. Under the terms of said agreement, the defendant, C. D. Johnson Lumber Corporation, was to unload the logs from the trucks. The contract between C. D. Johnson Lumber Corporation and W. R. Francis for the logging and delivery of said logs contemplated that the unloading of the trucks was to be done by the defendant, C. D. Johnson Lumber Corporation, and that the truck drivers would assist the employees of C. D. Johnson Lumber Corporation by performing certain functions in connection with the unloading. In arriving at the contract price for logs, due consideration was given to the fact that the truck drivers would so assist in the unloading.

(2) Numerous other trucks, the number ranging from ten to fifty, were hauling logs each day to said dock during the period that the decedent was hauling logs from W. R. Francis' operation to the dock; all of said trucks were delivering one to four

loads a day to the dock from various operations. Said logs had been purchased by the defendant, C. D. Johnson Lumber Corporation, or belonged to that corporation and had been logged by contractors for said defendant. The number of loads delivered to said dock daily ranged from thirty to more than one hundred.

(3) Defendant, C. D. Johnson Lumber Corporation, operated and had charge of the unloading dock at the time of the accident. All the employees working at said dock in connection with the unloading of logs with the exception of the log truck drivers were directly hired and paid by said defendant. All persons who worked or performed duties at said dock in connection with the unloading of logs did so under the direction and supervision of the defendant, C. D. Johnson Lumber Corporation.

(4) In July, 1949, decedent made oral arrangements with W. R. Francis to haul logs from Francis' operation to the C. D. Johnson Lumber Corporation dock at Toledo at an agreed rate per thousand board feet for the haul as compensation for the truck and for Hutchens' services as a driver. It was agreed that Hutchens would haul exclusively for Francis when he and his truck were needed. Hutchens did not agree to haul and Francis did not agree to furnish Hutchens with any certain quantity of logs or for any certain period. Either party was free to terminate the relationship at will.

(5) Hutchens was required to and did work the hours and days specified by W. R. Francis. He was

required to and did take his turn having his trucks loaded with logs along with the other truck drivers in the operation.

(6) The loading of the trucks was under the jurisdiction and control of the head loader, an employee of W. R. Francis.

(7) The head loader was responsible to properly load the said trucks in accordance with the Logging Safety Code of the State of Oregon. Hutchens was required to haul such logs as were placed on his truck and semi-trailer both as to the amount and type of logs and to take them to the place directed by the head loader.

(8) The manner of loading was substantially as follows: When the decedent, Dean Hutchens', turn came to have his truck loaded, the head loader would direct him where to place his truck so that it could be properly loaded. The head loader signalled the loading engineer to lift the semi-trailer off the truck to the ground while members of the loading crew, all employees of W. R. Francis, coupled the trailer to the truck. The head loader directed the spotting of the truck so that it could be loaded by a power-driven loading machine, the driver remaining in his truck and operating it as directed, after which the driver coupled the air brakes. The loader then selected the logs to be hauled and saw that they were properly placed in accordance with the requirements of the Logging Safety Code and other applicable laws. The driver might object to an overload or ask to have the load adjusted to balance it,

but in the case of any disagreement the final decision was that of the head loader, employed by W. R. Francis. After the logs were loaded they were scaled by the head loader, who gave the truck driver a slip showing his scale and who instructed the driver where the logs were to be delivered, which directions the driver was bound to follow. No truck driver was allowed to select the particular logs he would like to have on his truck, nor to select the particular destination to which said logs were to be delivered. After loading was completed and the scaling done, the truck driver put on his binder chains and drove his truck to the delivery destination point.

(9) Arriving at the destination point, the logs were unloaded and the trailer loaded on the truck under arrangements between C. D. Johnson Lumber Corporation and W. R. Francis. This was done as follows: The driver spotted his truck on signal from the operator of the unloading machine. The driver then hooked the sling lines from the machine around the logs and the lines were tightened. The driver then unfastened his binder chains and bunk blocks. On signal that everyone was in the clear, the unloading engineer raised the logs and rolled them over the side of the truck into the pond. After the load of logs had been dumped at the unloading dump, the trailer was then spotted under the hook of the unloading machine by the driver at the direction of the unloading engineer. The unloading engineer then started the machinery and raised the

truck into the air, and at the signal from the engineer the truck driver backed his truck under the suspended trailer to such position that when the trailer was dropped the tires fit into the proper notches on the truck and the reach into its slot overhanging the cab of the truck, after which the unloading engineer detached the hook and the driver drove off. After the trailer had been loaded on the truck, the truck was then driven back to the landing in the woods by the driver.

(10) The hauling of logs was an essential and integrated part of the operation of logging being carried on by W. R. Francis.

(11) The work performed by the decedent, Dean Hutchens, in the hauling of logs from the logging operations of W. R. Francis to the unloading dock of the defendant, C. D. Johnson Lumber Corporation, was manual work consisting of the driving of the truck and in the fastening and handling of lines, chains and blocks, and the decedent, Dean Hutchens, did not direct, control or supervise the work of any other person. He did not own any trucks other than the one which he himself drove.

(12) The work that the decedent, Dean Hutchens, performed at the landing where the logs were loaded, in the driving of the truck and in assisting the unloading engineer at the unloading dock and the unloading of the truck was in no respect different from the work performed in the same activities by log truck drivers who did not own their own trucks but who were paid for their driving and other



activities on the basis of an hourly wage or an agreed amount or percentage per thousand board feet of logs hauled.

(13) During the time that the decedent, Dean Hutchens, was hauling logs for W. R. Francis, with the exception of one week in which he hauled for another firm with the permission of Francis, he was engaged in no other hauling work and was engaged in no other occupation or business.

## II.

In the unloading of the truck, decedent assisted the unloading engineer and boom foreman employed by defendant, C. D. Johnson Lumber Corporation, and worked under the direction of said defendant and pursuant to its instructions and regulations.

## III.

At the time of the fatal accident, the defendant, C. D. Johnson Lumber Corporation, was the owner or person in charge of and responsible for the operation of the unloading dump and unloading machinery and facilities and for the work then and there being performed.

## IV.

At the time of the accident, Dean Hutchens was engaged in work assisting the unloading engineer to unload the load, which required him to be at the place where he received his fatal injuries. Said work involved a risk or danger to decedent.

## V.

At the time and place of the accident, the unloading engineer and the boom foreman employed by the defendant corporation were the foremen or persons in charge of the work.

## VI.

The signal to unload the log was given by the agent of the defendant corporation, the boom foreman, and the log was unloaded without notice or warning to the decedent. The engineer did not look to see whether Dean Hutchens was in the clear before he unloaded the log. If he had looked, he would have known that decedent was or might be in a place of danger, and the engineer could have avoided the accident.

## VII.

The defendant, C. D. Johnson Lumber Corporation, was negligent and failed to furnish the decedent, Dean Hutchens, with a safe place of employment and failed to use every device, care and precaution practicable to protect the safety of the decedent in the following particulars:

(1) In failing to furnish and provide an adequate number of trained, experienced men for its unloading crew and for the operation of the unloading machine, so that the unloading engineer would not have caused the load to be moved until decedent was in the clear, in violation of Section 6.5 of the Safety Code for Sawmills, Woodworking and Allied Industries of Oregon, and of Section

17.14 of the Logging Safety Code of the State of Oregon;

(2) In failing to require that all signals for the unloading of logs should come from a single designated person;

(3) In failing to provide sufficient workmen for the proper operation of the dump, and in requiring the driver of the truck being unloaded to assist in the unloading;

(4) In failing to make and enforce proper rules and regulations for the safe operation of the dump and conduct personal safety instructions of the employees engaged in the performance of the work at the dump, and in violation of the provisions of Sections 1.12, 1.13, 1.14 and 1.17 of the Logging Safety Code of the State of Oregon and Sections 1.16, 1.17(a) and 1.20 of the Sawmill Safety Code of the State of Oregon;

(5) In causing the log to be unloaded from the truck without notice or warning to the decedent, and in violation of Section 6.12 of the Sawmill Safety Code of the State of Oregon;

(6) In failing to provide the unloading machine with an audible warning device and in failing to sound an audible warning before unloading the log, and in violation of Section 3.4 of the Sawmill Safety Code of the State of Oregon;

(7) In failing to have stationed at the unloading dock an additional employee to assist the unloading engineer in the unloading of the logs and

to give signals for the unloading of logs, and to perform the duty of making certain that all persons were in the clear before a load was unloaded.

(8) In unloading said log without observing that the decedent was in the clear, and in violation of Section 17.14 of the Logging Safety Code of the State of Oregon and Section 6.12 of the Sawmill Safety Code of the State of Oregon;

(9) In giving the signal to unload the log and in causing it to be unloaded at a time when its agents knew, or, by the exercise of reasonable diligence should have known, that decedent was in a place of danger.

#### VIII.

It was practicable, without impairing the efficiency of the work then and there being done, to have protected, safeguarded and rendered safe the employment and place of employment by taking any or all of the precautions and correcting any or all of the conditions described in Paragraph VII immediately above.

#### IX.

One or more of the acts or omissions on the part of the defendant set forth in Paragraph VII immediately above was the sole, direct and proximate cause of the injuries resulting in the death of the decedent, Dean Hutchens.

#### X.

Prior to the accident, Dean Hutchens was a well, active, able-bodied workman of the age of twenty-one years, regularly employed and earning a net

sum of more than \$3,000.00 annually, and having a life expectancy of approximately forty-four years. He used substantially all of his income for the care and maintenance of the plaintiff and their home, and performed and furnished services, advice and counsel and other assistance to her. Plaintiff, by his death, has been deprived of his services, advice, counsel and financial and other aid and assistance, and has been generally damaged in the sum of \$75,000.00.

## XI.

Plaintiff, as a result of Dean Hutchens' death, has been obliged to pay or incur burial and funeral costs of the reasonable value of \$974.71, and has been specially damaged in that amount.

## Contentions of Defendant

### C. D. Johnson Lumber Corporation

## I.

The accident and death of the deceased, Dean Hutchens, is not governed by nor subject to the Employers' Liability Act of the State of Oregon:

1(a). The work said deceased was doing at the time and place of accident and his death, was that of an independent contractor, and

(b) The State Industrial Accident Commission has heretofore determined that the said decedent was acting at the time of his accident and death as an independent contractor and not as an employee.

2. The contract of the deceased was with W. R. Francis, hereinafter called the "Logger," and said

Logger had a contract with this defendant to deliver certain logs in the water of Yaquina River at Toledo and until so delivered the said Logger was to retain control of said Logs and was required to unload the same. As a result thereof the said contract with this defendant as verbally amended provided that the said Logger should pay the whole wages of the said crane engineer, an employee of this defendant, for such time as the said crane engineer spent unloading logs for the said Logger. The deceased, in turn, contracted with the Logger to deliver certain of the above logs as hereinabove described, and at the time of his accident and death was engaged in the performance of that said contract for the said Logger.

3. The deceased made his own working conditions and had effective control of said unloading operation and crane engineer assisting therein; in particular the deceased was required by contract, and custom to be solely in charge of:

(a) attaching sling line to the log, and

(b) unfastening his load, and

(c) checking to see that the said unloading operation could be done safely, and especially of checking to see that the boom man on the water was clear of the unloading area, and

(d) giving the signal to the crane engineer to commence unloading after deceased had completed the said required safety check.

4. It was required by law, custom and instruction that the deceased never place himself between

the brow log and the log load, and to take a safe place in giving said unloading signal, and there was such place to stand. And Further, it was the responsibility of the deceased upon his own initiative and without any order or instruction from anyone else to occupy such safe place and remain there until said unloading operation was completed.

5. This defendant denies that the sections of the Logging and Sawmill Safety Codes of the State of Oregon relied on by the plaintiff have any application to this action insofar as this defendant is concerned.

## II.

If the deceased was in fact an employee of the third-party defendant, the said William R. Francis, as is contended by the plaintiff, then in that event, it was the duty of the said William R. Francis and not of this defendant to instruct the deceased as to the manner of carrying out the unloading operation and particularly not to stand between the truck and the brow log while the log was being unloaded, and the said William R. Francis failed or neglected to give such instruction, and the said negligent failure to give said instructions concurred with the negligence of the deceased as hereinafter set forth to proximately cause said accident and death.

## III.

This defendant contends that the deceased was negligent, and that his negligence was the proximate cause of his accident and death in the following particulars:

1. In failing to comply with the standing instructions of this defendant to all truck drivers and contract log haulers to stand clear of the unloading operation and, in particular, not to stand between the truck and the brow log.

2. If the deceased was in fact an employee of the third-party defendant, the said William R. Francis, as is contended by the plaintiff, the deceased failed to comply with the Safety Code and standing instructions of the said William R. Francis not to stand between the truck and the brow log while the logs were being unloaded from the truck, if in fact any such instructions were given.

3. In violating the Logging Safety Code of the State of Oregon, particularly:

(a) Section 17.15 which provided that: "Men shall not go between the brow log and a load of logs," and

(b) Section 17.13 which provides that: "Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading."

4. In leaving a place of safety and placing himself in a perilous position between the log being unloaded and the brow log after having given the signal to the crane engineer to unload the log on deceased's truck.

5. In failing to take a safe position while the log was being unloaded from his truck when there was a safe position open to him.



6. In failing to exercise ordinary care for his own safety under the circumstances then and there existing.

IV.

There is no basis of liability set out in the Contentions of Plaintiff other than the Employers' Liability Act of the State of Oregon.

V.

This defendant is not liable in this action to the deceased under any theory or under any statute.

Issues of Fact

I.

Was the deceased, Dean Hutchens, at the time of the accident in the employment of William R. Francis?

II.

In the event that it be determined that the deceased was an employee of William R. Francis at the time and place of the accident, was there an intermingling of employees of said William R. Francis and employees of defendant, C. D. Johnson Lumber Corporation, in the furtherance of a common purpose?

III.

Was the deceased, at the time of the accident, an independent contractor or an independent subcontractor?

IV.

Was the deceased, Dean Hutchens, at the time of the accident, engaged in lawful duties in the

accomplishment of a common purpose in which defendant, C. D. Johnson Lumber Corporation, had an interest?

V.

Were the logs under the contract required to be delivered in the Yaquina River by the Logger?

VI.

Did the work being carried on at the time of the accident involve a risk or danger to Dean Hutchens?

VII.

Was the defendant, C. D. Johnson Lumber Corporation, the owner, contractor, subcontractor or other person having charge of or responsible for the work being carried on?

VIII.

Was the deceased in control of the unloading operations of the truck?

IX.

Was the deceased in the joint employment, at the time and place of the accident, of William R. Francis and C. D. Johnson Lumber Corporation?

X.

Regardless of deceased's status of an employee or independent contractor, did he make his own working conditions?

XI.

Was the defendant, C. D. Johnson Lumber Corporation, negligent or did it fail to take every de-

vice, care or precaution practicable to protect and safeguard the life and limb of the deceased in one or more of the respects charged by the plaintiff?

XII.

Was one or more of such alleged acts of negligence on the part of said defendant a direct and proximate cause of the death of Dean Hutchens?

XIII.

Was there a safe place for the deceased to stand while the log was being lifted by the crane?

XIV.

Was the deceased negligent in one or more of the respects charged in defendant, C. D. Johnson's, contentions?

XV.

Was any such negligence on the part of the said deceased a direct and proximate cause of the death of Dean Hutchens?

XVI.

What is the amount of damage, if any, that plaintiff has suffered as a result of her husband's death?

XVII.

Did the work of deceased require him to be between the brow log and log load at the time of the accident?

XVIII.

Was defendant C. D. Johnson Lumber Corporation negligent in violating provisions of the Oregon

Employers' Liability Act as charged by plaintiff in her contentions?

## Issues of Law

### I.

Was the decedent, Dean Hutchens, at the time and place of his fatal injuries, one of the class of persons entitled to the protection and benefits of the Employers' Liability Act of the State of Oregon regardless of whether or not he was an employee of William R. Francis?

### II.

Was the decedent an employee of William R. Francis at the time of the accident?

### III.

Was the defendant, C. D. Johnson Lumber Corporation, the employer, owner or other person responsible for the work and place of work, at the time of the accident, within the meaning of the Employers' Liability Act of the State of Oregon and under the provisions of said Sections 102-1228 and 102-1229, Oregon Compiled Laws Annotated, and under the provisions of the Logging Safety Code and Sawmill Safety Code of the State of Oregon?

### IV.

Did the work which was being carried on at the time of the accident and death involve a risk or danger to the decedent within the meaning of the Employers' Liability Act of the State of Oregon?

V.

If the decedent was in charge of the unloading or made his own working conditions, does Employers' Liability Act of the State of Oregon apply in this action?

VI.

Can this action be maintained by the plaintiff under the Employers' Liability Act of the State of Oregon?

VII.

Does a violation of the Logging Safety Code or the Sawmill Safety Code of the State of Oregon constitute negligence per se?

VIII.

Is the determination by the State Industrial Accident Commission conclusive in this action as to the status of deceased at the time and place of the accident and death?

Exhibits

The following exhibits have been displayed by the parties respectively and are below enumerated and identified, the parties agreeing, with the approval of the Court, that no further identification of exhibits is necessary.

Plaintiffs' Exhibits

1. Depositions of Frederick Miles Neal, Clyde Vincent and Thomas Wood.
2. Photograph of Dean Hutchens.

3. Photograph of dock and log unloading dump of C. D. Johnson Lumber Corporation showing log trucks, one of which is in the process of being unloaded, taken from the north facing south.

4. Photograph of dock and unloading dump of C. D. Johnson Lumber Corporation showing one truck of logs in process of being unloaded, taken from north facing south.

5. Photograph of log unloading dump of C. D. Johnson Lumber Corporation showing one log truck in process of being unloaded, taken from the north-west facing in a southeasterly direction.

6. Photograph of log dock and dump of C. D. Johnson Lumber Corporation showing two log trucks and unloading machine and truck ramp, taken from the north facing south.

7. Photograph of log dock and dump of C. D. Johnson Lumber Corporation showing two logging trucks and unloading machine, taken from the south facing north.

8. Photograph of International logging truck with one-log load.

9. Photograph of rear end of logging trailer showing trailer bunk, trailer wheels and chain and binder in place over one log.

10. Photograph of left rear end of logging trailer showing trailer bunk wheels and chain fastened over one-log load.

11. Close-up view of bunk and block of log trailer.

12. Photograph of left rear end of logging trailer showing tires, bunk, block and chain being tied in position around bunk block.

13. Photograph of dock and log unloading dump of C. D. Johnson Lumber Corporation showing millpond, taken from south facing north, showing a portion of the unloading crane and a portion of the pond, without trucks on dock.

14. Photograph of log unloading dump of C. D. Johnson Lumber Corporation taken from south along edge of dock facing in a northerly direction, showing unloading crane and portion of the log pond. No trucks shown.

15. Statement or receipt covering funeral expenses of Dean Hutchens.

16. Statement or receipt showing burial expenses of Dean Hutchens.

17. Safety Code for Sawmill, Woodworking and Allied Industries of Oregon of the State Industrial Accident Commission, effective January 2, 1946.

18. Logging Safety Code of the Industrial Accident Commission of the State of Oregon, effective October 25, 1944.

19. Income tax return of Dean Hutchens and Kathleen Hutchens for the year 1948.

20. Income tax return of Dean Hutchens and Kathleen Hutchens for the year 1949.

21. Records of receipts and disbursements of Dean Hutchens, 1949.

22. Record of wages earned by Dean Hutchens, 1948.

23. Deposition of William R. Francis.

24. (To be furnished): Payroll records showing wages earned by Dean Hutchens prior to ....., 1948.

Defendant, C. D. Johnson Lumber Corporation,  
Exhibits

1. Logging contract.
2. Receipts or records showing a portion of crane engineer's wages paid by Logger.
3. Payroll records of Francis.
4. Copy of ruling of State Industrial Accident Commission respecting status of deceased.
5. Payment records of Francis.
6. Photographs.

As Between Defendant C. D. Johnson Lumber Corporation and Third-Party Defendant William R. Francis, the following are the Admissions, Contentions, and Issues Raised by the Respective Parties:

AGREED STATEMENT OF FACTS  
IN CONTROVERSY

I.

Prior to the accident resulting in the death of plaintiff's decedent, third-party plaintiff, herein-



after referred to as "Johnson Company," and third-party defendant, hereinafter referred to as "Francis," entered into a contract for the logging and delivery by Francis to Johnson Company at Toledo, Oregon, of certain timber owned by Johnson Company. A copy of the contract is identified herein as Third-Party Defendant's Exhibit 1.

## II.

The contract, identifying the third-party plaintiff as "Owner," and third-party defendant as "Logger," provided, among other things, as follows:

(16) Logger expressly agrees to indemnify and save Owner and Owner's property harmless of and from any and all debts, dues, claims, demands, liens, charges, or damages arising out of or connected with Logger's operations under this contract which may be asserted by any person, association, corporation, Federal government or any agency thereof, or state government or any political subdivision or agency thereof.

(17) Logger shall accept the provisions of the Workmen's Compensation Act of the State of Oregon, and shall contribute to the Oregon Industrial Accident Fund for each and all of Logger's employees. Logger shall have the option and privilege of providing insurance satisfactory to Owner in lieu of accepting said Workmen's Compensation Act and contributing to said Oregon Industrial Accident Fund.

After the execution of the contract and prior to the commencement of Francis' operations thereunder, Francis filed with the Industrial Accident Commission of the State of Oregon a statement in writing giving his name and address and describing the logging operations in which he proposed to engage pursuant to his said contract with Johnson Company. Thereafter Francis contributed regularly to the Industrial Accident Fund and otherwise complied with the requirements of the Workmen's Compensation Law so as to extend its coverage and benefits to himself and his logging employees.

### III.

On and prior to the date of his death, plaintiff's decedent was engaged in hauling logs from the site of Francis' logging operation to Johnson Company's millpond in Toledo. He owned, operated and maintained the truck used in this connection, was paid according to the quantity of logs hauled, and was free to and did haul for other loggers from time to time. Francis did not carry plaintiff's decedent on Francis' payroll as an employee nor did he pay for or on his account any payroll taxes.

### IV.

Subsequent to the death of plaintiff's decedent, plaintiff, as his widow, applied to the State Industrial Accident Commission for death benefits provided by the Workmen's Compensation Law to the widow of an employee killed during the course of his employment. After a hearing duly held by the

State Industrial Accident Commission, an order was entered by the Commission as follows:

“That the claim of Mrs. Kathleen Hutchens, widow of the deceased, Hollis Dean Hutchens, should be and the same is hereby rejected as there is no evidence that said deceased, Hollis Dean Hutchens, was employed subject to the provisions of the Oregon Workmen’s Compensation Law at the time of said accidental injury causing his death.”

### Issues

1. Is Francis liable to C. D. Johnson Lumber Company for any loss or damage sustained by the latter in the within action, including expenses defending same?

2. Is the C. D. Johnson Lumber Company protected by insurance? In the event of a loss here, and if determined in the affirmative, is the insurance company subrogated to the rights of Johnson under the contract?

3. What was the status of the deceased at the time of the accident and death; and, regardless of the status of deceased, was there a breach of the logging contract by Francis in failing to provide either Workmen’s Compensation or insurance which would protect Johnson?

### C. D. Johnson Contentions

1. Defendant C. D. Johnson Corporation contends that third-party defendant Francis under the

logging contract referred to above is entitled to have third-party defendant Francis save defendant C. D. Johnson harmless from the expense of defending the within action and from any loss or damage or judgment which may be entered or sustained by the said C. D. Johnson Lumber Corporation in the within action under the indemnity provision contained in said contract.

2. Johnson contends that regardless of the indemnity provision contained in said contract that third-party defendant Francis, in event of a loss or judgment entered herein against Johnson on any basis of a violation of the safety logging code or the sawmill safety code, that such loss would be a breach of the logging contract, the natural consequence of which resulted from such breach, and particularly in Francis' failure to instruct the decedent to take a position of safety after the unloading operation started and in failing to instruct the deceased not to stand between the truck and the brow log.

3. Johnson contends that it was the intention and contemplation of Johnson and Francis under the said logging contract that Francis would protect Johnson from loss in connection with all truck drivers hauling logs to Johnson, and that the contract between Hutchens and Francis was made without any permission or consent on the part of Johnson and was a breach of said logging contract; that the parties contemplated that the logs would be hauled by employees of Francis, and had the

contract been carried out by Francis using his own employees this action could not be maintained and no loss could be sustained by Johnson; that it was the intention of the parties that Francis would protect Johnson by insurance coverage if no protection was afforded by the Workmen's Compensation Act, and in this instance in employing an independent contractor who was not brought under the Workmen's Compensation Act there was a breach by Francis of the contract in failing to provide insurance protection.

4. Johnson contends that it does have a public liability policy of insurance issued by the St. Paul Mercury Indemnity Company, but that said company has undertaken the defense of this action under a full reservation of all right and without prejudice that in the event a loss is sustained herein by Johnson that the insurance company would be subrogated to all of Johnson's rights under the contract.

### Francis Contentions

1. Francis contends that he is not liable to Johnson Company for any judgment that may be returned against Johnson Company in favor of plaintiff herein or for any other loss or expense sustained by Johnson Company herein. Such judgment or loss or expense, if any is returned, would be predicated solely upon the negligence of Johnson Company or the concurring negligence of Johnson Company and plaintiff's decedent, Dean Hutchens. Plaintiff does not allege that Francis

was guilty of any negligence causing or contributing to the cause of Hutchens' death, and, therefore, liability of Francis, if any, on account of such death would be based solely upon the indemnity provision of the agreement between Johnson Company and Francis. This provision was not intended to, and in fact and law does not, indemnify Johnson Company against its own negligence.

2. Francis contends that he fully complied with the provisions of his logging contract with C. D. Johnson Lumber Company, and that any alleged breach thereof by his alleged failure to instruct Hutchens not to go between the brow log and truck during the unloading operations was not a proximate cause of any loss that Johnson might sustain because of the action brought against Johnson Lumber Company by the plaintiff, Kathleen Hutchens, herein.

3. Francis contends that he was under no obligation imposed upon him by contract with C. D. Johnson Lumber Corporation or otherwise to haul or cause Johnson's logs to be hauled by Francis' own employees rather than by independent contractors.

4. Francis further contends that any liability or loss that may result to Johnson Company on account of plaintiff's claims will be paid either by Johnson Company's public liability insurance carrier or its employers liability insurance carrier, and that Johnson Company will be saved harmless by its own insurance from any damage claimed or

awarded in this action. It is not the purpose of the indemnity provision in the agreement hereinabove set forth to impose upon Francis damages awarded against Johnson Company for its own negligence and covered by Johnson Company's own liability insurance.

5. Francis further contends that Johnson Company is not the real party in interest herein in that it is fully protected by liability insurance and that the loss or damage sustained by or imposed upon Johnson Company in this action will be paid by its insurer. Francis contends that if Johnson Lumber Company is subjected to any loss or judgment in this action such loss or judgment will be paid by said insurance company and by reason of its subrogation to Johnson's rights, if any, against Francis; St. Paul Mercury Indemnity Company is the real party in issue and Johnson Lumber Company cannot therefore maintain this third-party action or proceeding against Francis.

### Jury Trial

Timely request was made for trial by jury in the case of Kathleen Hutchens vs. C. D. Johnson Lumber Corporation, a corporation.

The foregoing pre-trial order is the result of a conference between the attorneys and the Court. It is definitive and comprehensive and isolates all of the issues of fact and law now existing between the parties. The pleadings have served their purpose and now pass out of the case. This pre-trial order

shall govern the course of the trial and shall not be changed or amended unless by consent of the parties and the Court or modified at the trial by the Court to prevent manifest injustice.

Dated this 20th day of June, 1950.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed June 20, 1950.

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[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFEND-  
ANT C. D. JOHNSON LUMBER CORPO-  
RATION

I.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (1) which appears on page 8 in the pre-trial order. The E. L. A. is designed to require safe appliances and devices and this specification would not be a violation of the Act. There is no evidence to support the claimed violation and moreover plaintiff seeks to recover solely under the Act and the Act itself sets the standard of care required. A violation of some other law or code as claimed here can not be ingrafted upon the E. L. A. In short, the provisions of the Act cannot be enlarged; the remedies are entirely different. The E. L. A. strips the employer of his defenses; the other law does not.



## II.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (2) for the reasons stated above with respect to specification of negligence (1); and further, there is no evidence that this would be a violation of the E. L. A. and there is no requirement by the Act at all that signals should be given by certain designated persons.

## III.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (3). There is no evidence to support a violation of the E. L. A. with respect to this specification. There is nothing in the Act to require any particular number of workmen. The contract and other evidence shows that it was the obligation of the Logger to deliver the logs in the water. This specification of negligence is in part a repetition of specification of negligence (1).

## IV.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (4) for the same reasons stated with respect to withdrawal of plaintiff's specification of negligence (1).

## V.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (5). First for the reason that there is

no evidence under this specification to constitute a violation of the E. L. A. and no evidence to support any lack of notice to the decedent as it was his duty to give the signal to move the log and to take a safe place while that operation was being carried on.

## VI.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (6) for the same reason stated with respect to specification of negligence (1); and moreover, the Sawmill Safety Code could have no application in this matter in that there was no sawmill involved.

## VII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (7) for the reason there is no evidence to support a violation of the E. L. A. That this specification is merely a repetition of other specifications above.

## VIII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (8) in that there is no evidence to support a violation of the E. L. A. and further for the same reasons as expressed above particularly with respect to the request for the withdrawal of specification of negligence (1).

## IX.

The court is requested to withdraw from the con-

sideration of the jury plaintiff's specification of negligence (9) on the ground and for the reason that this specifies a breach of the common law and not a breach of the E. L. A. There is no evidence under this specification of negligence to show any violation of the E. L. A.

### X.

Defendant C. D. Johnson Lumber Corporation moves the court for an order directing a verdict in its favor on the grounds and for the reason there is no evidence in this case of any violation of the Oregon Employers' Liability Act to support a verdict in favor of the plaintiff. In the event the court refuses or fails to so direct a verdict without waiving the same then this defendant requests that further instructions be given to the jury.

### XI.

I instruct you that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of violating the E. L. A. of the State of Oregon in one or more of the particulars herewith submitted to you before you could allow her any recovery in this case.

### XII.

I instruct you that by a preponderance of the evidence is meant that quality of evidence which brings moral certainty to an unprejudiced mind. And as stated above the plaintiff has this burden and if she fails to prove her case by a preponder-

ance of satisfactory evidence then in that event your verdict shall be for the defendant.

### XIII.

I instruct you that the mere fact that an accident occurred here which resulted in the death of Dean Hutchens is no evidence that the defendant was negligent. The law recognizes the fact that accidents happen at times without negligence on the part of anyone; therefore, the mere fact that an accident occurred here resulting in the death of Dean Hutchens is not sufficient for you to return a verdict in favor of the plaintiff.

### XIV.

I further instruct you that if after considering the evidence you find that it is evenly balanced, that is to say that it weighs no heavier in favor of the plaintiff or in favor of the defendant, then in that event the plaintiff has failed to prove her case by a preponderance of the evidence and your verdict would be for the defendant.

### XV.

I instruct you that if you find from the evidence that the deceased was an independent contractor or an independent subcontractor that this particular action cannot be maintained by the plaintiff and your verdict would be for the defendant. This particular law is designed to apply to employees only and not to independent contractors.

## XVI.

I instruct you that if you find from the evidence that the deceased made his own working conditions, that is to say that there was a safe place for him to be while the log was being rolled into the water, then in that event there could be no recovery under the E. L. A. against this defendant as it is the duty of a person who has a safe place furnished to him to take that safe place for his own protection.

## XVII.

I instruct you that if you find from the evidence that under the Logging contract that it was the responsibility of the Logger to deliver the logs in the water, then, in that event, the logger would be in control of the log until it was dumped in the water and it would be up to the Logger to comply with the provisions of the E. L. A.

## XVIII.

I instruct you that if you find that the crane engineer's wages were paid by the Logger or some deducted from the remittances made to the Logger on account of the crane engineer's wages while assisting in the unloading of the log in question, you could consider this along with other evidence as to whether the truck driver or Logger was in charge of the unloading operation.

## XIX.

I instruct you that if you find from the evidence that the truck driver was in charge of the unloading operation, then, in that event, it was up to the truck

driver to see that the provisions of the E. L. A. were complied with.

## XX.

I instruct you that if you find from the evidence that the truck driver made his own working conditions and was responsible for his own movements and actions and the place where he could stand while the log truck was being unloaded then in that event there would be no violation of the E. L. A. by the defendant C. D. Johnson Lumber Corporation and your verdict would be for the defendant.

## XXI.

I instruct you that the defendant was not an insurer of the safety of the deceased Dean Hutchens and could be held liable in this case only if you find that the defendant was in violation of the E. L. A. in one or more of the particulars on which I have instructed you. However, in this respect, I caution you and further instruct that the Act would have no application and no recovery could be had by the plaintiff unless the deceased was working as an employee at the time of the accident. In other words, if you find that he was an independent contractor the Act would not apply. I further instruct you that if you find that the deceased was an employee of Wm. R. Francis and if you should further find that Francis, the Logger, had the responsibility of delivering the logs in the water and was in charge of the unloading operation of the log through his employee, the deceased Dean Hutchens, and that the negligence of Francis

in failing to comply with the provisions of the E. L. A. or in some other particular negligence as charged, and that such negligence was the proximate cause of the accident and death of the deceased, then in that event your verdict would be for the defendant C. D. Johnson Lumber Corporation and against the plaintiff.

## XXII.

I instruct you that if you find from the evidence that the proximate cause of the accident and death was the result of the negligence of the Logger, Wm. R. Francis, then, in that event, the plaintiff could not recover against defendant C. D. Johnson Lumber Corporation and your verdict would be in favor of defendant C. D. Johnson Lumber Corporation.

## XXIII.

I instruct you that the Logging Safety Code of the State of Oregon provides that all bunker chains and binder chains shall so be attached that they can be released from the side opposite to the brow log and if under the evidence you find in this case that the chains used could not be detached from the side opposite to the brow log, then in that event this provision of the logging code would have been violated and in this connection you are instructed that it was the duty of the Logger Francis to see that this provision was complied with in the event the deceased was an employee of Francis; and you are further instructed that it would be the duty of the deceased to see that this provision of the safety code was complied with in the event you

would find that the deceased was an independent contractor and not an employee. In short, it would be the obligation of either Francis, the Logger, or the deceased, if he were an independent contractor, to comply with this safety rule and a failure to comply with the same would be negligence as a matter of law. And if you should further find that the failure to comply with this safety rule was the sole proximate cause of the accident, then in that event there could be no recovery here and your verdict would be for the defendant.

#### XXIV.

I instruct you that the Logging Safety Code of the State of Oregon prohibits anyone from going between a load of logs and a brow log and therefore if you find in this case that the deceased went between a log load and the brow log then he would be in violation of this provision of the safety code and you are further instructed that a violation of this provision of the safety code would be negligence as a matter of law and if you further find that this negligence was the sole proximate cause of the accident and death then in that event your verdict would be for the defendant and against the plaintiff.

#### XXV.

I instruct you that the deceased Dean Hutchens had the duty of exercising care for his own safety. I further instruct you that if you find from the evidence that there was a safe place for the deceased to stand while the log was being unloaded and that



the deceased failed to take such safe position for his own safety, then in that event you would find that the deceased was negligent and if such negligence was the sole, proximate cause of the accident and death, then in that event your verdict would be for the defendant.

### XXVI.

I instruct you that the law presumes that the parties here were in the exercise of ordinary care and in this respect the law presumes that the logging truck and the bunks thereon were equipped with chains which would enable the deceased here to unfasten the bunk blocks from the side of the truck opposite the brow log and that it would not be necessary for him to go between the brow log and the loaded truck in order to release the bunk blocks or other fastening chains.

### XXVII.

I instruct you that if you find from the evidence the deceased left a place of safety and placed himself in a perilous position between the log being unloaded and the brow log after having given the signal to the crane engineer to unload the log this would constitute negligence on the part of the deceased and if you further find that deceased was negligent in this respect and that such negligence was the sole proximate cause of the accident, then in that event your verdict would be for the defendant and against the plaintiff.

## XXVIII.

I instruct you that the crane engineer was entitled to rely upon the deceased to observe the law and to exercise reasonable care for his own safety and in this respect he was entitled to rely upon the deceased to observe the safety code rule and not go between the log load and the brow log.

## XXIX.

I instruct you that the equipment, chains, and parts, bunk blocks, and truck were under the control of the deceased and not under the control of the defendant C. D. Johnson Lumber Corporation and if you find from the evidence that there was a defect in the manner in which the chains were applied or the bunk blocks set and that such defect was the sole and proximate cause of the accident and death, defendant C. D. Johnson Lumber Corporation would not be responsible therefor and your verdict would be for the defendant.

## XXX.

I instruct you that if you find from the evidence that the deceased Dean Hutchens was an employee of Francis the Logger, then Francis would be responsible for the truck and its equipment including the chains and the bunk blocks and if you find that Francis was negligent with respect to such equipment, chains and bunk blocks furnished and that such negligence, if any, was the sole proximate cause of the accident and death of Dean Hutchens, then in that event plaintiff could not recover here and your verdict would be for the defendant.

## XXXI.

I instruct you that if you find from the evidence that the accident and death of the deceased resulted through some defect in the truck equipment which the deceased had charge of and that was the sole proximate cause of the accident and death, then in that event the defendant would have no responsibility here and your verdict would be for the defendant.

## XXXII.

I instruct you that the E. L. A. is designed to furnish protection to employees with respect to equipment and appliances and machinery used and it is only in case where an accident results through the failure of an employer to use every care and safeguard with respect to the machinery, equipment, or other device resulting in injury or death that gives rise to a cause of action under said Act. In short, the Act does not nor does it intend to furnish protection for human failure only.

## XXXIII.

I instruct you that if you find from the evidence that the deceased placed himself in a position between the log load and the brow log, that this would be in violation of the Logging Safety Code which would be negligence in and of itself. I further instruct you that if the deceased placed himself in this position due to some defective equipment or chain attachment on the truck in which the deceased was in charge of or Francis the Logger was in charge of or responsible for, this would not con-

stitute a violation of the E. L. A. by defendant C. D. Johnson Lumber Corporation as it is the person in charge of and responsible for the equipment that has the duty of complying with the provisions of the Act and no recovery here could be had against the defendant for violation of the Act by Francis or the deceased Dean Hutchens.

#### XXXIV.

I instruct you that if you find from the evidence that the deceased Dean Hutchens carried on his work in and around the truck in connection with the unloading of the log by himself and without the intermingling in that work of any employees of C. D. Johnson Lumber Corporation, then in that event the E. L. A. would have no application and your verdict would be for the defendant.

#### XXXV.

I instruct you that if you find from the evidence that the deceased Dean Hutchens was in charge of the particular work in which he was engaged at the time of the accident and death, then it was his statutory duty to see that the requirements of the E. L. A. were complied with and in the event he failed to perform his statutory duty no recovery could be allowed here and your verdict would be for the defendant. *Robbins v. Irwin*, 180 Or. 667, p. 679.

#### XXXVI.

I instruct you that liability under the E. L. A. cannot be predicated upon the mere fact that the

work involved risk or danger. The plaintiff must go further and show a breach of duty on the part of the defendant and therefore if you find from the evidence in this case that the accident and death here did not result through the failure of any device, apparatus or other equipment of the defendant C. D. Johnson Lumber Corporation, then in that event plaintiff has failed to establish a case and your verdict would be for the defendant. *Ferretti v. S. P. Co.*, 154 Or. 97.

### XXXVII.

I instruct you that if you find from the evidence that the deceased could or should have performed his work in a safe place and was not required to go between the log load and the brow log and that his failure to carry on his work in a safe place rather than putting himself in a dangerous position was negligence and such negligence was the sole proximate cause of the accident, then in that event your verdict would be for the defendant and against the plaintiff.

In the District Court of the United States  
For the District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant.

### VERDICT

We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at \$68,377.20.

Dated this 22nd day of June, 1950.

/s/ TIMOTHY E. O'LEARY,  
Foreman.

[Endorsed]: Filed June 22, 1950.

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[Title of District Court and Cause.]

### MOTION FOR ORDER DIRECTING ENTRY OF JUDGMENT

Comes now the plaintiff, by and through William A. Babcock, one of her attorneys, and moves the Court for a determination that there is no just reason for delay in the entry of judgment upon the claim of Kathleen Hutchens, plaintiff, vs. C. D.

Johnson Lumber Corporation, defendant, and for the entry of an order directing the Clerk of the Court to enter a judgment for plaintiff on said claim. In support of said motion plaintiff represents and alleges as follows:

This cause was regularly placed upon the calendar for trial and reached in its regular order for trial, and separate trials were ordered by the Court on the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and the third-party claim of C. D. Johnson Lumber Corporation, third-party plaintiff, vs. William R. Francis, third-party defendant. The claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, came on regularly for trial on June 20, 1950, plaintiff, Kathleen Hutchens, appearing in person and by her attorneys, Emerson U. Sims and William A. Babcock, and defendant, C. D. Johnson Lumber Corporation, appearing by James Arthur Powers, its attorney. A jury trial was had, and the jury rendered a verdict in favor of the plaintiff and against the defendant.

The claim of the third-party plaintiff, C. D. Johnson Lumber Corporation, vs. third-party defendant, William R. Francis, was based upon an alleged agreement of indemnity on the part of the said third-party defendant for any damages arising out of or connected with the operations of William R. Francis. Any liability on the part of William R. Francis will not arise until a loss has been suffered by the C. D. Johnson Lumber Corporation. The entry of judgment on verdict of the jury in favor

of the plaintiff, Kathleen Hutchens, on her claim against C. D. Johnson Lumber Corporation, is a pre-requisite to the claim of C. D. Johnson Lumber Corporation vs. William R. Francis.

There is no just reason for delay in the entry of judgment on the verdict in favor of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and the entry of such judgment will in no way prejudice the rights of either the defendant and third-party plaintiff, C. D. Johnson Lumber Corporation, or the third-party defendant, William R. Francis.

Wherefore, the plaintiff prays for an order of the Court determining that there is no just cause for delay in the entry of a final judgment on the verdict in favor of the plaintiff, Kathleen Hutchens, and against the defendant, C. D. Johnson Lumber Corporation, and directing the Clerk of the Court to enter a judgment on the verdict.

Dated this 23rd day of June, 1950.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1950.



[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-  
STANDING VERDICT OF JURY

Comes now defendant C. D. Johnson Lumber Corporation and moves the court for the entry of judgment in its favor notwithstanding verdict of the jury on the grounds and for the reasons following:

(1) There is no specification of negligence in the pre-trial order which would constitute violation of the Employers' Liability Act of the State of Oregon.

(2) There is no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Employers' Liability Act.

(3) The only possible evidence of negligence in this case would be for common law negligence or possibly a breach of some Oregon statute which is not part of the Oregon Employers' Liability Act.

(4) There is no evidence in this case to show any violation on the part of this defendant of the Employers' Liability Act in that there is no evidence of any failure to use every device, machinery and other apparatus as required by the Oregon Employers' Liability Act.

(5) There is no evidence showing that the status of the decedent at the time and place of his death was such as to bring him within the class of persons

entitled to protection under the Employers Liability Act.

Wherefore, defendant asks that judgment now be entered in its favor and plaintiff's complaint dismissed.

/s/ JAMES ARTHUR POWERS,  
Attorney for Defendant C. D. Johnson Lumber  
Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 29, 1950.

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[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now the Defendant C. D. Johnson Lumber Corporation and moves the Court for an order granting this defendant a new trial on the grounds and for the reasons as follows:

(1) Prejudicial error occurred at the trial in the Court's failure to submit to the jury this defendant's theory of defense concerning the status of the decedent at the time of the accident and death and particularly in failing to submit to the jury the question of whether decedent was an independent contractor; and secondly, in failing to submit to the jury the question of whether there was an intermingling in the carrying out of the particular operation between employees of this defendant and decedent as an employee of a third party.

(2) In erroneously instructing the jury to determine an issue of negligence that was not in the pre-trial order, namely the matter of what the Court referred to as a conflict in the evidence as to what type of signal was given. That is to say, a signal to unload the log or a signal that decedent was going between the truck load and the brow log—and to hold everything. (The so-called negligent misinterpretation referred to by plaintiff's counsel.) It is submitted that this was **prejudicial error** of the highest sort as there was no contention of negligence made by the plaintiff on this ground. No specification of negligence on this ground and in fact no competent evidence for the jury to consider as to whether the defendant was so negligent. This instruction of the Court on an issue foreign to those specified in the pre-trial order, we submit, was highly prejudicial to this defendant's right to a fair trial especially in view of the argument of plaintiff's counsel to the jury which went clear beyond the record in this respect. So much so that he likened the act of the crane operator to the acts of the asserted murderers now getting front page headlines in connection with the trial at Vancouver, Washington.

(3) In failing to give defendant's requested instruction concerning the Logging Safety Code which prohibits men from going between a loaded truck and the brow log. This was prejudicial error as it completely deflated argument made by defendant's counsel on this point and deprived the defendant of its theory of defense. The jury not being in-

structed on this important provision of the Logging Safety Code had the effect of stripping the defendant of this very important defense.

(4) The Court's failure to instruct the jury as requested by defendant that if the decedent here made his own working conditions, then in that event he would not be entitled to the protection of the Employers' Liability Act.

(5) In failing to instruct the jury that if the decedent was furnished a safe place to stand while the log was being unloaded, and, if he left that safe place, and took a position of danger, then the Employers' Liability Act of Oregon would not apply. This instruction as requested by defendant also presented defendant's theory of the case and failure to give this instruction we submit was substantial error and prejudicial to defendant.

(6) Failing of the Court to withdraw from the consideration of the jury any violation of the Logging Code as a basis for recovery under the Employers' Liability Act and in giving plaintiff's requested instructions to the jury that they should consider whether the defendant was negligent respecting same and allowing the jury under the instructions to return a verdict in favor of the plaintiff for a violation of the Employers' Liability Act based on other legal duties not contained therein and thus enlarging the provisions of the Employers' Liability Act by grafting thereon other rules and laws not a part thereof.

(7) The verdict is excessive and rendered under the influence of passion and prejudice and secondly for erroneous instructions given by the Court to the jury respecting damages which did not correctly state the rule governing the measure of damages in this type of action and coupled with that in instructing the jury on percentages with respect to contributory negligence which referred to 10 per cent negligence on the part of the deceased and 25 per cent negligence on the part of the deceased without offsetting it by an instruction 90 per cent negligence on the part of the deceased and thus permitting the jury to get the idea the Court's feeling of the decedent's negligence was not more than 50 per cent, and possibly only 10 or 25 per cent.

(8) In failing to instruct the jury as requested by defendant that the decedent was negligent as a matter of law in going between the truck load and the brow log, and that if such negligence was the sole proximate cause of the accident, no recovery could be had. (Defendant's requested instruction No. 24.)

(9) In failing to instruct the jury as requested that if the negligent equipment on the truck such as the chains or the manner in which it was loaded or attached were defective, that this would not be the responsibility of defendant C. D. Johnson Lumber Corporation but would be the responsibility of the decedent or the third-party logger.

(10) In failing to instruct the jury as requested that they should consider who was in charge of the

unloading of the truck and if they found the decedent was in charge of the unloading of the truck that the duty would be upon the decedent to see that the provisions of the Employers' Liability Act were complied with. (Defendant's requested instruction No. 19.) And in this same connection in failing to give defendant's requested instruction No. 18 in determining that question as to who was paying the crane engineer's wages.

(11) In instructing the jury as the plaintiff requested with respect to the specification of negligence No. 4 with respect to duty of the defendant C. D. Johnson Lumber Corporation to have supervisors and give instructions in accordance with the provisions of the Logging Safety Code. This clearly could not be ingrafted upon the Employers' Liability Act and moreover the Logging Safety Code in this respect relates to the employer of the particular employee and does not relate to third-party employers nor is it intended to require a third-party employer to give instructions or to supervise the employees of another employer.

(12) In failing to instruct the jury that the Employers' Liability Act of Oregon and the risk and danger referred to thereunder applies only to the particular place and the particular work being done at the time and place of the accident and to make it clear to the jury that if the decedent was performing no work at the time of the accident and that there was a safe place furnished for him to stand, then no recovery could be had.

Wherefore, defendant respectfully submits that the foregoing errors are substantial and that they were prejudicial to this defendant and that a new trial should be ordered so that the issues may be properly submitted to the jury so that this defendant would have a fair and legal trial.

/s/ JAMES ARTHUR POWERS,  
Attorney for Defendant C. D. Johnson Lumber  
Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 29, 1950.

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[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF  
OPINION ON MOTION FOR NEW TRIAL

Comes now the plaintiff, by and through Emerson U. Sims and William A. Babcock, her attorneys, and moves the Court for a reconsideration of its decision and opinion made in the above matter on December 5, 1950, and particularly that portion of said opinion and decision providing as follows:

“\* \* \* Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein, the motions for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered

for the remaining sum of \$46,500.00 with costs; but, if such remittitur be not so served and filed on or before December 20, 1950, the motion for a new trial will be allowed. \* \* \*”

Plaintiff further moves the Court that, pending hearing, argument and decision on this motion, the Court enter an order extending the time within which plaintiff is to be permitted to file a remittitur until after decision on this motion and a reasonable time thereafter.

This motion is made and based upon the following grounds:

(1) The decision and opinion of the Court to the effect that it will enter an order allowing a new trial in this case unless the plaintiff files a remittitur in the amount of \$21,877.20 on or before December 20, 1950, presents a question which was not argued before the Court and concerning which the view and position of the plaintiff have not heretofore been expressed.

(2) This action was brought under the Employers' Liability Act of the State of Oregon, for damages for the death of plaintiff's husband, Dean Hutchens, and the rights of the plaintiff and the duties of the defendant herein arise under the Constitution and Laws of the State of Oregon.

(3) The United States District Court, in an action brought under the laws of the State of Oregon based upon diversity of citizenship of the parties, is bound to follow the law of the State of



Oregon to determine the right of the plaintiff to recover and the nature and extent of such right, and the United States District Court is without power to take any action which substantially affects the enforcement of the right as given by State law.

(4) By virtue of the provisions of Article VII, Section 3, of the Constitution of the State of Oregon, and the decisions of the Supreme Court of the State of Oregon interpreting said Article and Section, the Trial Court, in an action arising under the laws of the State of Oregon, is without power to set aside a verdict of a jury on the ground that it is excessive, or to reduce the amount of said verdict or to condition the granting of a new trial on the filing of a remittitur by the plaintiff of a portion of the verdict.

(5) The right of the plaintiff to a trial by jury without re-examination of said verdict by the Court under the laws of the State of Oregon is a matter of substance which significantly affects the rights of the plaintiff and the results of the litigation, and is controlling upon this Court.

(6) This Court was without power to condition the denial of the motion for new trial upon a remittitur of any portion of the verdict.

(7) Assuming that the Court had power to reduce the amount of the verdict on the ground that it was excessive, or to direct the filing of a remittitur as a condition of denying the motion for new trial, the Court erred in directing the filing of a remittitur

for the amount of \$21,877.20 for the reason that there is no evidence to support such amount and the Court's action in arriving at said amount is purely arbitrary and capricious.

Dated this 18th day of December, 1950.

/s/ EMERSON U. SIMS,

/s/ WM. A. BABCOCK,

Of Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 19, 1950.

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[Title of District Court and Cause.]

### ORDER FEBRUARY 9, 1951

Now at this day It Is Ordered that the motion of the plaintiff for reconsideration of the opinion rendered herein be, and is hereby, denied.

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[Title of District Court and Cause.]

### REMITTITUR

Comes now the plaintiff and files this as and for a remittitur herein of the sum of \$21,877.20, upon the verdict found and entered by the jury on June 21, 1950.

This remittitur is filed pursuant to the opinion of the Court of December 5, 1950, requiring said remittitur as a condition of the Court's denial of

defendant's motion for new trial, to which action by the Court plaintiff objects and excepts for the reasons set forth in plaintiff's motion for reconsideration previously filed herein.

This remittitur is filed without prejudice, in the event the defendant appeals from the judgment entered pursuant to such remittitur, to the rights of the plaintiff to appeal the action of the Court in conditioning its order denying the motion for new trial upon the filing of such remittitur.

Dated this 19th day of February, 1951.

/s/ MRS. KATHLEEN  
HUTCHENS,

/s/ EMERSON U. SIMS,

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff.

Approved this 19th day of February, 1951:

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 19, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR A  
NEW TRIAL

This matter having come on regularly to be heard before the Honorable Gus J. Solomon, Judge, upon Motion for a New Trial heretofore filed by the defendant, C. D. Johnson Lumber Corporation, plaintiff appearing by Emerson U. Sims and William A. Babcock of her attorneys, and defendant appearing by James Arthur Powers, its attorney, and the court having heard arguments of counsel and having considered the briefs submitted by counsel;

And the court having on December 5, 1950, given its oral opinion in said matter, providing for the denial of said motion upon the plaintiff filing a remittitur of the verdict of the jury in the amount of \$21,877.20, and allowing plaintiff until December 20, 1950, to file said remittitur;

And the plaintiff having, prior to said date, filed its motion for reconsideration of the opinion on motion for new trial, and an order having been duly made and entered extending the time for the filing of a remittitur until ten days after the hearing and decision of the court on said motion;

And the court having, on February 9, 1951, after hearing on said motion and consideration of the briefs filed by counsel, entered an order denying said motion for reconsideration:

And plaintiff having on the 19th day of February, 1951, filed her remittitur pursuant to the opinion

of the court in the amount of \$21,877.20, and said remittitur having been approved by the court; now therefore;

It Is Hereby Ordered that the motion for a new trial heretofore filed by the defendant, be and the same hereby is overruled and denied.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT

This matter having regularly come on to be heard before the Honorable Gus J. Solomon, Judge, upon the Motion for Judgment Notwithstanding the Verdict of Jury heretofore filed by the defendant, C. D. Johnson Lumber Corporation, plaintiff being represented by Emerson U. Sims and William A. Babcock of her attorneys, and defendant being represented by James Arthur Powers, its attorney, and the court having heard arguments of counsel and having considered the briefs submitted by counsel, and being fully advised in the premises;

It Is Hereby Ordered that the said Motion for

Judgment Notwithstanding Verdict of Jury be and the same hereby is denied.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

## ORDER DIRECTING ENTRY OF JUDGMENT

This matter having come on regularly to be heard before the Honorable Gus J. Solomon, Judge, on motion of the plaintiff for a determination that there is no just reason for delay in the entry of judgment upon the claim of Kathleen Hutchens, plaintiff vs. C. D. Johnson Lumber Corporation, defendant, and for the entry of an order directing the Clerk of the Court to enter a judgment for plaintiff on the verdict made and entered in said cause, plaintiff appearing by Emerson U. Sims and William A. Babcock, of her attorneys; defendant, C. D. Johnson Lumber Corporation, appearing by its attorney, James Arthur Powers, and third-party defendant William R. Francis, appearing by his attorneys, Hart, Spencer, McColloch, Rockwood & Davies, and a hearing having been held upon said motion, and the court having heretofore denied motions for new trial and judgments notwithstanding verdict filed by defendant, C. D. Johnson Lumber Corporation;

And the plaintiff, having pursuant to the direction of the court as a condition for the denial of the motion for new trial, filed her remittitur in the sum of \$21,877.20, which remittitur has been approved by the court, and the court being fully advised in the premises; and

It appearing that there is no just reason for delay in the entry of judgment upon the verdict in favor of the plaintiff, Kathleen Hutchens, against the defendant, C. D. Johnson Lumber Corporation;

It Is Hereby Adjudged and Determined that there is no just cause for delay in the entry of said judgment; and

It Is Hereby Ordered and the Clerk of the Court is directed, that judgment shall be entered immediately upon the verdict of the jury and the remittitur of the plaintiff in favor of the plaintiff, Kathleen Hutchens, against the defendant, C. D. Johnson Lumber Corporation, in the amount of \$46,500, together with costs and disbursements of the plaintiff.

Dated this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

## ORAL OPINION

(12-5-50)

Gus J. Solomon, Judge.

The case of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and W. R. Francis, third-party defendant, is now before the Court on the motion of plaintiff for an order directing entry of judgment based upon the verdict of a jury awarding plaintiff damages against the defendant in the sum of \$68,377.20, and upon defendant's motions for a judgment notwithstanding the verdict and for a new trial.

In support of its motions, defendant contends that the Court erred in excluding evidence of the deceased's employment status and in failing to submit to the jury the question of whether the deceased was an independent contractor or an employee of W. R. Francis, the third-party defendant. Defendant maintains that, if the deceased were an independent contractor, he would not be entitled to the benefits and protection of the Oregon Employers' Liability Act; therefore, the failure of the Court to permit evidence on his employment status and its failure to submit such question to the jury constituted error.

I have carefully reviewed the evidence, as well as the admissions made in the pre-trial order, and I believe that the evidence and such admissions show that:



The defendant owned and operated the unloading dock and the unloading equipment on such dock at the time of the accident.

On the date of the accident, there were approximately twenty trucks hauling logs to this dock and each truck averaged about four trips a day.

All logs unloaded on this dock had been purchased, or were being purchased, by the defendant or were cut from timber which belonged to the defendant and which had been logged by contractors for and on behalf of the defendant. Most of the trucks using such unloading dock and facilities were operated by employees of such contractors, but there were some trucks which were operated by the owners thereof who were paid by these contractors on a trip or footage basis. All trucks, however, whether they were operated by employees or by individual owners, performed identical services and the unloading at the dock was done pursuant to instructions from the unloading engineer, an employee of defendant who supervised and had charge of the unloading dock and all unloading operations thereon.

In other words, all the workmen using defendant's unloading dock and facilities, including defendant's employees, employees of contractors, and individuals who were hauling logs under contract for such contractors, were lawfully on the defendant's premises, either by reason of their employment or because of contract, and all of them were engaged in a common purpose in which the defendant had an interest and were exposed to the dangers

of such work, which was supervised by defendant's unloading engineer.

The Oregon cases interpreting Sec. 102-1601-2 OCLA hold that, even though the benefits and protection of the Employers' Liability Act do not extend to the general public as such, it is not necessary for the injured workman to be an employee of the particular owner and operator of dangerous machinery or equipment or engaged in the hazardous work of such owner in order to come within the purview of the Act. Employees of persons other than the owner, whose lawful duties require them to be about or work with dangerous machinery or equipment, and employees of customers of such owner, who are lawfully on the owner's premises and who use such equipment while they engage in their occupations, are protected by the Act. *Rorvick vs. North Pacific Lumber Co.*, 99 Ore. 58, and *Coomer vs. Supple Investment Co.*, 128 Ore. 224.

Even though many of the cases refer to the fact that the injured workman was an employee, coverage under the Act was dependent upon whether an injured workman's duties required him to be about the machinery or hazardous work of the owner in the accomplishment of a common purpose in which the owner had an interest. In my opinion, it is immaterial whether an injured workman is required to be on the premises and perform work by reason of a master and servant relationship with either the owner or contractor or because of a contract with either of them. It is the nature of the work and not the technical legal status of the workman which controls.

Under the more recent cases, it has been held that persons in a supervisory capacity, or persons who control the work or operations in which they are engaged, are not covered by the Act. In my instructions to the jury, I recognized this rule by instructing the jury that, if they found that the deceased made his own working conditions, he would not be entitled to the benefits of the Act.

Many of the other specifications of error set forth in defendant's motions for judgment notwithstanding the verdict and for a new trial concern themselves with the failure of the Court to give certain instructions. An examination of the instructions reveals that, in most instances, the substance of such requested instructions was actually given. As to the other specifications, I find that they are without merit.

I am, however, concerned with the size of the verdict. At the time of the fatal accident, the deceased was 21 years of age. His wife was 23 years of age. His net taxable income for the year 1948, after he had acquired the truck, was only \$1,256.28 and, for the first eight months in 1949, his total net income from all sources was only \$2,127.59. His total net income for 1949, if he had lived and his income had continued on the same basis during the winter months, would have been approximately \$3,000.00.

There was evidence that the deceased was a hard-working and thrifty young man, and his future earnings might have been much greater. However,

the pecuniary loss to the wife is not to be measured by the full net earnings of the husband.

I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberations or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that, when the verdict of the jury is clearly excessive, it is the duty of the trial judge to refuse to permit such an award to stand.

I have carefully considered all of the evidence touching upon damages and I believe that the verdict of the jury is excessive to the extent of \$21,877.20. Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein, the motions for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered for the remaining sum of \$46,500.00 with costs; but, if such remittitur be not so served and filed on or before December 20, 1950, the motion for a new trial will be allowed. Attorneys for plaintiff will prepare appropriate instruments in accordance with this oral opinion.

[Endorsed]: Filed March 23, 1951.

[Title of District Court and Cause.]

ORAL OPINION

(2-9-51)

Gus J. Solomon, Judge.

In the case of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and W. R. Francis, third-party defendant, the jury awarded plaintiff damages against defendant, C. D. Johnson Lumber Corporation, in the amount of \$68,377.20. Thereafter, this defendant filed motions for judgment notwithstanding the verdict and for a new trial. On December 5, 1950, I rendered an opinion denying defendant's motions on condition that plaintiff file a remittitur in the amount of \$21,877.20 on or before December 20, 1950. On December 18, 1950, plaintiff filed a motion for reconsideration of such opinion. Plaintiff contends that a Federal District Court has no power to set aside a verdict of a jury, on the ground that it is excessive, or to condition the denial of the new trial on the filing of a remittitur by the plaintiff of a portion of the verdict, in those cases before it solely by reason of diversity of citizenship where the state law governing the substantive rights of the parties denies to its courts such power.

In order to permit a full examination of the issues raised by this motion, the Court entered an order on December 19, 1950, granting plaintiff 10 days after entry of the Court's decision on such motion,

if the same were denied, within which to file a remittitur.

All of the decisions cited by the plaintiff in support of her motion have been carefully examined and none of them, in the Court's opinion, alter or impair the power of a Federal District Judge to require a remittitur of the excessive portion of a jury's verdict as a condition to the denial of a new trial.

Rule 59 (a) (1) of the Federal Rules of Civil Procedure, authorizes the granting of a new trial "in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

On numerous occasions, the Supreme Court of the United States has recognized the power of a trial judge to condition the denial of a new trial on a remittitur. *Northern Pacific Railroad Co. vs. Herbert*, 116 U. S. 642 and *Dimick vs. Schiedt*, 293 U. S. 474.

Neither *Erie R. Co. vs. Tompkins*, 304 U. S. 64, nor any of the later Supreme Court decisions, which have construed such case and its underlying policy, has impaired that power. It is a problem of Federal Court procedure and is not dependent upon the law of the state which governs the substantive rights of the parties. *Rice vs. Union Pacific R. Co.*, 82 F. Supp. 1002.

The other ground for plaintiff's motion is that the Court acted arbitrarily and capriciously in or-

dering a reduction of the recovery to \$46,500.00 as a condition to its denial of a new trial.

I find that this ground is also without merit.

Plaintiff's motion for reconsideration is therefore denied.

[Endorsed]: Filed March 23, 1951.

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In the District Court of the United States  
for the District of Oregon

Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant and Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

### JUDGMENT

This cause having been regularly placed upon the calendar for trial and having reached its regular order for trial, and separate trials having been ordered by the Court on the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, and on the third-party claim of C. D. Johnson Lumber Corporation, plaintiff, vs.

William R. Francis, third-party defendant, and the claim of Kathleen Hutchens, plaintiff, vs. C. D. Johnson Lumber Corporation, defendant, having come on regularly for trial on June 20, 1950, plaintiff, Kathleen Hutchens, appearing in person and by her attorneys, Emerson U. Sims and William A. Babcock, and defendant, C. D. Johnson Lumber Corporation, appearing by James Arthur Powers, its attorney, and a jury trial having been had and the jury having rendered a verdict in favor of the plaintiff and against the defendant for \$68,377.20;

And the Court having heretofore denied motion of the defendant, C. D. Johnson Lumber Corporation, for judgment notwithstanding the verdict, and having denied the motion of said defendant for a new trial subject to the filing by the plaintiff of a remittitur of \$21,877.20 of verdict rendered by the jury, and the remittitur in such amount having been filed by the plaintiff and approved by the Court;

And the Court having determined that there is no just cause for delay in the entry of judgment and having ordered and directed the Clerk to enter a judgment on said verdict,

Now, Therefore, on motion of William A. Babcock, of attorneys for said plaintiff,

It Is Adjudged and Determined that the plaintiff, Kathleen Hutchens, do have and recover of the C. D. Johnson Lumber Corporation, defendant, the sum of \$46,500.00, together with the costs and disbursements of this action, taxed and allowed at the sum of \$455.11, making a total judgment of



\$....., and that plaintiff have execution therefor.

Witness the Honorable Gus J. Solomon, Judge of said Court, and my hand and the seal of said Court, this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed February 20, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the C. D. Johnson Lumber Corporation, a corporation, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and the whole thereof, entered in this action on the 20th day of February, 1951, and which judgment is now final.

/s/ JAMES ARTHUR POWERS,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING TRANSMISSION  
OF ORIGINAL EXHIBITS

This matter having been heard by the Honorable Gus J. Solomon, Judge, on motion of the defendant C. D. Johnson Lumber Corporation, and the Court being of the opinion that the original exhibits should be sent to the Court of Appeals for the Ninth Circuit in lieu of copies, and the Court being fully advised in the premises,

It Is Hereby Ordered and the Clerk of the Court is directed to send to the Clerk of the Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this action together with all original exhibits marked for identification only and not received in evidence for use on said defendant's appeal in their original form and not to be printed in transcript of record on appeal.

Dated at Portland, Oregon, this 24th day of April, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed April 24, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT WILL RELY ON APPEAL

Appellant C. D. Johnson Lumber Corporation  
will rely on the following points on appeal:

I.

1. The Court erred in refusing to grant defendant's motions for a directed verdict and for judgment notwithstanding the verdict, upon the ground that there was no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Oregon Employers' Liability Act since the said Act was inapplicable where the deceased left a safe place provided for the doing of his work and contrary to law entered a place of danger.

2. The Court erred in failing to charge the jury that to apply the Oregon Employers' Liability Act in this action it was necessary to first determine the nature of deceased's employment status, specifically whether or not he was an independent contractor or an employee.

3. The Court erred in refusing to admit in evidence a ruling of the Oregon State Industrial Accident Commission as to the deceased's employment status being that of an independent contractor.

4. The Court erred in failing to charge the jury that if the Oregon Employers' Liability Act was

applicable in this action the jury must then decide whether the deceased was the person in charge of the unloading of his truck within the meaning of the said Act because person in charge of said operation is responsible for compliance with said Act and is not entitled to claim a violation thereof.

(a) This Court further erred in failing to charge the jury that in determining who was in charge of the said unloading operation they must consider who paid the crane engineer for the said unloading.

(b) The Court further erred in failing to charge the jury that depending on whether or not the deceased was an employee of William R. Francis or an independent contractor then either William R. Francis or the deceased and not the defendant were responsible for any defective device on the deceased's truck.

5. (a) The Court erred in failing to charge the jury that the Logging Safety Code of the State of Oregon prohibited the deceased from going between the brow log and the log on his truck; and if they found that the deceased did so go, he was negligent as a matter of law.

(b) The Court further erred in failing to charge the jury if deceased was negligent as stated, and if the said negligence was the sole proximate cause of the accident no recovery could be had.

6. The Court further erred in failing to give defendant's Requested Instructions No. 1 through 9 which requested the Court to withdraw from the

consideration of the jury the certain specifications of negligence referred to therein and in particular the specifications of negligence with respect to any duty on the part of defendant to furnish the deceased with a safe place to work, as it appears conclusive from the evidence that the deceased in violation of the Oregon Logging Safety Code had placed himself in an unlawful place at the time of the accident and was then and there doing an unlawful act.

7. The Court erred in depriving the defendant of its theory of defense by failing to give defendant's Requested Instructions No. 15 and 17, in that it took away from the jury the matter of passing on the employment status of the deceased at the time of the accident.

8. The Court erred in failing to instruct the jury as requested with respect to a requirement that there must be an intermingling of employees in any event in this case before the Oregon Employers' Liability Act would apply.

/s/ JAMES ARTHUR POWERS,  
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR  
FILING REMITTITUR

Upon a motion of the plaintiff for reconsideration of the Court's opinion and decision made on December 5, 1950, in the above matter, and a motion for extension of time for filing the remittitur pending the disposition of the motion for reconsideration; and

It appearing to the Court that the said motion for reconsideration presents substantial questions of law affecting the decision of the Court on defendant's motion for new trial and plaintiff's motion for an order directing the entry of judgment; and

It appearing that there is insufficient time to hear and determine said questions prior to the time allowed for the filing of a remittitur by plaintiff,

It Is Hereby Ordered that the time allowed to plaintiff for filing a remittitur as set forth in the opinion of the Court on December 5, 1950, is extended until ten days after the hearing and decision of the Court on the plaintiff's Motion for Reconsideration of Opinion on Motion for New Trial.

Dated this 19th day of December, 1950.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed December 19, 1950.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that Kathleen Hutchens, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered February 20, 1951, to the extent that it was based upon a remittitur.

/s/ E. U. SIMS,

Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 21, 1951.

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[Title of District Court and Cause.]

## STATEMENT OF POINTS UPON WHICH PLAINTIFF, CROSS-APPELLANT, WILL RELY ON APPEAL

Plaintiff, cross-appellant, Kathleen Hutchens, will rely on the following points on appeal:

### I.

The Court erred in failing to enter a judgment on the verdict in its entirety and in failing to grant plaintiff's motion for an order directing entry of judgment on the verdict in its entirety.

### II.

The Court erred in making the order denying the

motion for a new trial conditional upon the filing of a remittitur.

### III.

The Court erred in denying the motion for reconsideration of opinion on motion for a new trial, and in failing to reverse such an opinion, and in failing to direct entry of a judgment on the verdict.

### IV.

The Court erred in holding that the amount of the verdict was excessive and that such amount should be reduced, and in directing that unless a remittitur was filed a new trial would be granted.

### V.

The Court erred in making its order directing entry of judgment on the verdict as reduced.

/s/ WM. A. BABCOCK,

Of Attorneys for Plaintiff,  
Cross-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 24, 1951.

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[Title of District Court and Cause.]

PLAINTIFF, CROSS - APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the plaintiff, cross-appellant, Kathleen Hutchens, and hereby designates the follow-



ing portions of the record, proceedings and evidence to be contained in the record on appeal from the District Court of the United States for the District of Oregon, to the United States Court of Appeals for the Ninth Circuit, as follows:

1. The entire transcript of the pre-trial conference as shown by the reporter's transcript, except for those sections and pages specifically designated by the appellant under Item 7 in its designation of the contents of record on appeal.

2. The order extending the time for filing the remittitur.

3. Notice of appeal of the plaintiff, cross-appellant.

4. Plaintiff, cross-appellant's, bond.

5. Plaintiff, cross-appellant's, statement of points upon which plaintiff, cross-appellant, will rely on appeal.

6. Plaintiff, cross-appellant's designation of contents of record.

Dated at Portland Oregon, this 24th day of April, 1951.

/s/ WM. A. BABCOCK,  
Of Attorneys for Plaintiff, Cross-Appellant, Kathleen Hutchens.

Receipt of copy acknowledged.

[Endorsed]: Filed April 24, 1951.

In the District Court of the United States  
For the District of Oregon  
Civil No. 5087

KATHLEEN HUTCHENS,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Defendant and Third-Party Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

TRANSCRIPT OF  
PRE-TRIAL CONFERENCES

May 16, 1950—9:30 o'Clock A.M.

Before: Honorable Gus J. Solomon,  
Judge.

Appearances:

WM. A. BABCOCK,

Of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,

EARLE P. SKOW, and

FRANK E. NASH,

Of Attorneys for Defendant and Third-  
Party Plaintiff.

HUGH L. BIGGS,

Of Attorneys for Third-Party Defendant.

Mr. Babcock: I don't know. Perhaps it would be difficult. We have a third contention, which is one of law, and that is that in any event, even though he was an independent contractor, he is entitled to the protection of the Employers' Liability Act. That is more a contention of law than anything else.

Mr. Powers: You have a legal contention that no matter who he—even if he were an independent contractor that he would be entitled to the benefits of the Act?

Mr. Babcock: That's right.

Mr. Powers: As a member of the public.

Mr. Babcock: Not as a member of the public under the circumstances.

The Court: What is the name of your case on that?

Mr. Babcock: Well, there are a number of cases which——

The Court: I think Mr. Strayer just got through with that point over in this court. I believe he disagreed with your position.

Mr. Babcock: I appreciate that. I assume Mr. Nash and [25\*] Mr. Powers disagree, but in the language of the decisions of the Supreme Court, I think the position is well taken.

The Court: The reason I ask you about what case you were relying on is I have read a lot of those cases, and I just want to see what line you are using over there. There is a long series of cases—Clayton v. Enterprise Electric Company, Rorick v. North Pacific Lumber Company, Walters v. the

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Dock Commission, Coomer v. Supplement Investment Company, and McKay v. Pacific Building Materials Company. I am acquainted with all those cases.

Mr. Babcock: Then there are two cases in which the language of the Court is inconsistent with our position, but in which the decision was not necessary to the case. That is Saylor v. Enterprise Electric.

The Court: Who?

Mr. Babcock: Saylor v. Enterprise Electric. The language employed by the Court in that case might seem to exclude a person in the position of the decedent, here, but actually was not necessary to the decision of the case.

The language of these other cases——

Mr. Biggs: Have you cited Helzer v. Wax?

Mr. Babcock: Helzer v. Wax is another case which might appear to be somewhat inconsistent with our position.

Mr. Biggs: Is that the only one that actually did involve an independent contractor? [26]

Mr. Babcock: The only one I know of. The Saylor case did not. It involved somebody who was a trespasser, or, at best, a licensee, and in that case it was held that the party was not entitled to the benefit of protection of the Act but the language the Court used, that it might be confined to an employee, was language which was not necessary to the case. Broader language was used subsequently in other decisions. In the Coomer v. Supplement Investment Company and Drefths v. Holman Transfer Company, the latest two cases of

the group—the language was much broader in these. The plaintiff, here, assuming he was an independent contractor—that is the decedent——

The Court: Don't all those cases say you have to establish the relationship of employer-employee between——

Mr. Babcock: No.

The Court: ——as to somebody who is conducting the work?

Mr. Babcock: No, they don't say that. They say that in *Rorick v. North Pacific Lumber Company*. For example the Court used this language——

The Court: What were the facts?

Mr. Babcock: He was the captain of a steamship. He was not an employee in the ordinary sense of a person entitled an employee. He was a supervisor.

The Court: He was employed by the shipping company?

Mr. Babcock: But he was a supervisory or managerial employee, [27] and the Court said: "From a loose interpretation in that case and other cases mentioned, we deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such, but it does extend to an employee of the particular person owning or operating the dangerous machinery and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery or expose themselves to the hazard of the machinery or appliances in use by the owner thereof"; but it doesn't confine it to an employee.

Mr. Powers: Well, he was an employee in that case, anyway.

The Court: I think that the word "person" is used synonymously with "employee."

Mr. Biggs: They have directly so held in other cases you have cited.

(Argument, citing cases.)

The Court: Well, don't you think this might be the place to decide that question rather than go into court? Have you men heard about this contention of Mr. Babcock before this morning?

Mr. Powers: He never brought it up. I mean he has never made any legal statement on it.

Mr. Babcock: I certainly did.

Mr. Biggs: Yes, he did.

Mr. Babcock: I took that position in open court the first [28] day. I will ask Mr. Skow.

Mr. Powers: I wasn't here the first day, but in any event I am certainly not taken unawares. I am familiar with these cases, and embarrassingly familiar with the McKay case, which is my case.

The Court: I don't think the McKay case has anything to do with it.

Mr. Powers: I don't either. That was a question of whether there was any evidence to show that the two companies or one company belonged to the other. But I do think that the thing that has to do with it is the statement throughout the Employers' Liability Act, and, as Judge Fee stated, he was familiar with the Clayton rule, and so on.

(Discussion, citing cases.)

The Court: Is this the proper time to discuss this particular contention?

Mr. Powers: Well, it certainly would be helpful if it could be discussed and disposed of, and if that is what the Federal Rules of Civil Procedure try to do, try to reduce the issues instead of enlarging them, it might be very helpful.

Mr. Babcock: Well, your Honor, I have this thought: That at any rate we would want our position set forth in the pre-trial order, and we would want a ruling on that in such form that it would be clearly in the record, and we perhaps would wish to request an instruction on it. [29]

The Court: Well, I will tell you what I am going to do on that. I didn't realize we would be up against that contention. Can we go through the rest of the pre-trial order and reserve opinion on this one—put in his contention, and I will reserve ruling on it until prior to the time of the trial—and I hope a few days, at least, before I will make a ruling on that. As long as not all of you are prepared to answer or discuss some of the cases which Mr. Babcock has, I think we can use our time much more profitably on other portions of the pre-trial order. [30]

\* \* \*

Mr. Babcock: \* \* \* Secondly, the statement in there that the Industrial Commission has determined that decedent was acting at the time of the accident as an independent contractor is, in our opinion, entirely immaterial and not properly a part of this proceeding. It should not be in the

pre-trial order or should not be inadmissible in evidence.

Mr. Powers: That doesn't make it admissible, because it is in there. That will be determined at trial, I presume.

The Court: But the question is, may something be included in the pre-trial order that is absolutely inadmissible at the trial? Why would the determination by the Industrial Accident Commission have any bearing upon this proceeding?

Mr. Powers: Well, they have filed in here an election with the Industrial Accident Commission that is in the court records, and they are proceeding on that basis, so it has all the bearing in the world here.

The Court: You mean to say that if the State Industrial Accident Commission holds that Hutchens was an independent contractor that that is binding upon him in this proceeding or is any evidence? [49]

Mr. Powers: I think it would be binding unless he took an appeal from it.

Mr. Babcock: May I call your Honor's attention——

Mr. Powers: I think it would be binding unless there is an appeal. They have the right of appeal. Whether they have taken an appeal—we don't know what they do or propose to do.

Mr. Babcock: May I call your Honor's attention to the provisions and the language of the Code in 120-1729 where it is stated that in any third-party action brought pursuant to the provisions of this



Act the fact that the injured workman or his beneficiaries are entitled to or have proceeded shall not be pleaded or admitted. I think under the provisions of the Code it is clearly inadmissible.

Mr. Powers: This is in the nature of a supplemental pleading. You have stated what you contend, and it has been held that these determinations of the Accident Commission become binding on the Court if there is not an appeal taken from them. I am not so sure about Oregon, but I do know there are cases in Oregon.

The Court: Their act is considerably different from ours, isn't it?

Mr. Powers: It is different, but the administration of it is probably the same. It proceeds as an administrative body. In that respect it is similar, very similar. It certainly can't prejudice anybody to have it in there. [50]

The Court: Well, I don't think it should go in there. I think if you want to under your contentions of law that it might go in if it goes in any place.

Mr. Powers: How would we prove it? Suppose we want to make a showing, an offer of proof. The contentions of law I think should be determined from what your proof is, and there are a good many. As I started out, there are a good many things I don't think should be in here as far as the plaintiff's contentions are concerned, and I say since they put them in I have got to answer them, and I have answered them, and to let him say who was complying with the safety rule, and so on, and that

he was an employee—now, in face of the fact that it has actually been determined by the Accident Commission that he was an independent contractor—I don't see how I could just sit silently by.

The Court: Well, I——

Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

Mr. Powers: I don't know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

Mr. Babcock: I don't contend, except that that fact is entirely immaterial to this proceeding. [51]

Mr. Powers: You were there and we weren't.

Mr. Babcock: If you want a copy of the Commission's order I should be glad to make it available to you.

Mr. Powers: Has it become final?

Mr. Babcock: Yes; it is under appeal.

Mr. Powers: You have taken an appeal?

Mr. Babcock: Yes.

The Court: What is the order?

Mr. Babcock: The order is that the claim of Kathleen Hutchens, widow, should be and the same is hereby rejected, and there is no evidence that said the deceased was employed subject to the provisions of the Oregon Workmen's Compensation Act at the time of said accidental injury causing his death.

Mr. Powers: And you, of course, will stipulate

that Francis was subject to the Workmen's Compensation Act at the time.

Mr. Babcock: That's right.

Mr. Powers: And you applied for compensation under the theory he was an employee of Francis?

Mr. Babcock: That's right.

Mr. Biggs: Isn't the official determination of an administrative body admissible in evidence, though not binding on the Court, where the claimant and his working situation is the very same matter before the administrative body as is before the Court? Isn't the administrative body's decision admissible in evidence for whatever [52] weight the Court may give it, and don't Courts incline to give considerable weight to such rulings? That is the general rule. I don't know why it wouldn't be admissible.

Mr. Babcock: That isn't my understanding of it, and, in addition, here, you have the actual provisions of the Code that that fact isn't to be brought into the case as far as the jury is concerned—at least whether he is or may be entitled to compensation under the State Act.

Mr. Powers: We would like to have it stay in if we can.

The Court: I think I am going to let it stay in despite the fact that I have grave doubts as to whether or not you may introduce any evidence on it, but I think the pre-trial order should contain all of the contentions of the parties. [53]

\* \* \*

Mr. Powers: Here is the point. We might not

be out of the lawsuit if this man is held to be an employee of Francis. Francis did all this. He did the loading. The deceased didn't have anything to do with those chains, and I don't know what they will have in the way of evidence about who told him not to go between the brow log. I know what we will have and what our understanding was with Francis, that no truck driver was to go between the brow log and the truck.

Mr. Biggs: You understand that if he did, he, himself, would be guilty of negligence in that regard.

Mr. Powers: Not necessarily so. I don't know what they will contend in that. When we let that contract with Francis, that was our understanding, that they would first bring the logs up into the water in boom sticks, and then that was revised and they were allowed to deliver them, and this service was—or they were permitted to use the crane and to pay for the engineer's wages, but it was their business to get the log in the water. Now, their contention is that he was on special employment for Johnson. We deny that. Their contention is that in any event he would be an employee of Francis. If he was an employee of Francis under our contract we have the right to show what we would expect would be done, and one thing was that the truck driver would not get between [57] that brow log and the truck.

Mr. Babcock: Well, we haven't charged you with any negligence on that.

Mr. Powers: Yes, I think you have. You claimed we violated the Safety Code rule in two or three

places, and you say up above that Francis was the one, and it was his loader that was bound to observe the Safety Code.

Mr. Babcock: We haven't charged you with negligence in permitting the driver to get between the truck and the brow log.

Mr. Biggs: You made that statement. Where do they charge you with such negligence?

Mr. Powers: Well, that is the only thing it can be. We admit he was killed when he was between the truck and the brow log. It is our contention he didn't have any business there. It is our contention under this contract no driver should get in there during the loading. Now, if they would admit that——

Mr. Biggs: Now, let's take that position.

Mr. Powers: Of course, this is between us and them.

Mr. Biggs: I understand that, except I can't understand why you keep attempting to charge Francis with something that they don't charge Francis with, and that doesn't advance your defense or support your defense.

Mr. Powers: I think it does.

Mr. Biggs: I don't care to argue it. I am not called on [58] to answer them, I assume.

Mr. Powers: I am making this against them. This isn't in any contention against you, but I am answering them, and you are coming into it now, and that is the reason I was asking you, but you noted undoubtedly up here in No. III that he contends that the employees were Francis' em-

ployees, and that the head loader—it was up to him to see whether the Safety Code rules were complied with. One of the safety rules is that the chain be so hooked on there that it can be unfastened from the opposite side of the brow log.

Mr. Biggs: I don't understand that he asserts that any place as negligence. As I understand the theory of his fact statement on that point it is to show that because of the control of Francis over the details of some of the logging operations there was probably an employer-employee relationship existing, but not otherwise, and anything in connection with the loading he was responsible for the loading and the unloading. Is that correct?

Mr. Babcock: That's correct.

Mr. Powers: If we can get a statement to that effect it will simplify this. They have made the contention that the deceased was on the opposite side of the truck to take off a binder chain at the time this accident occurred, and he was over there in the business of getting this unloaded. Now, if Mr. Babcock will say that is not the fact—— [59]

Mr. Babcock: No. I said we weren't charging any negligence on Francis in connection with the loading of the truck, and we aren't charging any negligence against C. D. Johnson in permitting him to go around in that position.

Mr. Biggs: Nor are you charging negligence against C. D. Johnson in connection with the manner that the truck was loaded.

Mr. Babcock: That's right.

Mr. Biggs: No charges of negligence were made against Francis or your client, C. D. Johnson, as to the manner in which the truck was loaded or the manner in which the truck was equipped. Is that correct, Mr. Babcock?

Mr. Powers: Let's put that in their contention. I'd like to have that in there.

Mr. Babcock: It is in there. We don't have to put in the things we don't contend.

Mr. Powers: What I would like to have you put in is your admission in court here.

The Court: It is in the record right there.

Mr. Biggs: It is right in the record.

Mr. Powers: And transcribe that for me if you will, please.

Now, another point. Is it not your contention that he had to be between two trucks and the brow log in order to unload his truck, and that that is what he was doing at the time of the accident? [60]

Mr. Babcock: That's correct.

Mr. Powers: Is it not part of the Safety Code rule that your binder chain shall be so put on that it is to be unfastened and released from the opposite side of the brow logs?

Mr. Babcock: Well, whether it is and whether that applies to the decedent in this particular situation is a question. I don't know. That would be a matter for you to contend, I assume.

Mr. Powers: Don't you see what you are saying up here is that the loader, the Francis loader, you say, it was up to him to select the log to be hauled, and he saw they were properly placed in accordance

with the Logging Safety Code and other applicable laws. Well, now, if that is the case your man had no business, and you are admitting it, on the other side of that truck, because it does require that binder chain to be on the opposite side of the brow log.

Mr. Biggs: Testimony has been taken already of Francis showing that the binder chain on a single log could be completely untied from the opposite side of the truck, and Mr. Babcock is not contending that the loader was in any way at fault in the manner in which it was tied.

Mr. Powers: But he is claiming, when he makes the other.

Mr. Babcock: I am not claiming one way or the other on that.

Mr. Powers: Let's go down here and see whether you make [61] that claim. I didn't bring in the Safety Code. ". . . in failing to enforce . . ."—maybe I am wrong— ". . . in failure to enforce proper rules and regulations in the safe operation of the dump and to conduct personally safety instruction of the employees engaged in the performance of work at the dump and in violations of the provisions of Section 1.12, 1.13, 1.14, 1.17 of the Logging Safety Code."

Mr. Babcock: No, I am reading from No. 2, the one we are reading from.

The Court: I see it in Subparagraph (4).

Mr. Babcock: Oh, page 7. I will have to take back my statement. I was mistaken.

Mr. Powers: We worked hard getting these in



some kind of shape, here, but that was the reason for it. And that would be the only reason you would put in there that the head loader was the one looking after that for Francis.

Mr. Babcock: But my statement remains that we aren't charging Francis with negligence.

Mr. Powers: But what you are trying to do is exonerate your own man from negligence.

Mr. Babcock: Naturally.

Mr. Powers: And that is the reason we want this in.

Mr. Biggs: What are these sections, and are they sections you are relying on?

Mr. Babcock: Yes. [62]

\* \* \*

The Court: What is your view as to whether or not the [65] violation of the Safety Code provision or any administrative ruling would be negligence or is evidence of negligence? Is there any dispute about that?

Mr. Babcock: It is our understanding and our position that it does constitute negligence per se.

The Court: Is that your contention also, Mr. Powers?

Mr. Powers: Our contention is that the jury should go by the facts here and not by this Safety Code. We didn't think that the Safety Code came into it until they brought it in. Now they brought it in and so we have answered them on the Safety Code.

The Court: In other words, you think the jury should have the information contained in the rules

of the Safety Code. You are pleading it yourself, and therefore——

Mr. Powers: I am simply pleading it in answer to them. I wouldn't have written it in at all unless they first brought it in. They opened it up, and I can, without prejudice to my position, answer it, and that is what brought it in.

Mr. Babcock: If he is going to contend that plaintiff violated some evidence of the contention I think he should make a definite position on it.

Mr. Powers: I made my position very clear. You claim there was a violation of the Safety Code. I don't think the Safety Code should be in it at all, but since you opened it up I have the right, I think, to reply to it without saying that [66] it should come in. If the Court should rule that you are right, that the jury shall be instructed as to what the Safety Code is, then I would want an instruction on mine. In other words, I have got to be prepared to meet whatever the ruling of the Court is on that. If the Court would want to rule on it now we could leave it out and it would be a wonderful thing. I would just as soon have the Court rule on it in advance. I would be very much pleased to have the Court rule whether the Safety Code will be given to the jury as some guide.

The Court: There is a recent decision upon the admissibility of safety codes, is there not?

Mr. Babcock: I am not familiar with it.

Mr. Biggs: Yes, I think there is, your Honor. I think that if a situation is one to which the logging or sawmill code promulgated by the Accident Com-

mission applies, violation of it is negligence per se.

Mr. Babcock: The last case I know is *Farley v. Consolidated Timber Company*, in which the Court held that the requirements of the Code were matters of public law, and, by implication, at least, although not in so many words, that they constituted negligence per se in the situation to which they applied.

Mr. Powers: Is that the case of *Bob Mautz and Glenn Jack*?

Mr. Biggs: No; *Bill Morrison* and——

The Court: Let's keep going. [67]

\* \* \*

The Court: Now, the issues of fact, is there any objection as to these?

Mr. Babcock: I might say on those, your Honor, in connection with the same question that came up under the contentions of [70] fact, perhaps we will want to revise the way I have them stated to make it clear that we aren't claiming joint employment, because they are misleading, I admit, at the present time.

Mr. Powers: You will clear that up in the contentions, too, won't you?

Mr. Babcock: At the same time as I clear it up in the contentions. [71]

\* \* \*

The Court: Let me ask one other question. Assume that the plaintiff does not recover against *C. D. Johnson Lumber Company*. Have you any-

thing in a separate trial to go against William R. Francis?

Mr. Babcock: Not in this case.

The Court: Not in this case?

Mr. Babcock: We have pending now a Workmen's Compensation claim, which has been initially rejected, and I wouldn't say—it is conceivable that at some future date it might be decided to sue Francis separately. I don't know. I hadn't thought about it.

The Court: Under the Employers' Liability Act?

Mr. Babcock: That's right; because he didn't cover these drivers under his contributions. He covered all the other employees, but he didn't make contributions to the state for drivers. [82]

The Court: What did that mean? If he should have paid contributions and didn't, he would be liable under the Compensation Act, but he wouldn't be liable under the Employers' Liability.

Mr. Babcock: What I had in mind, if the state rejects that claim, if its rejection is sustained on appeal either on the theory that he was an independent contractor or some other theory, then it is conceivable—I don't think likely, but it is conceivable—we might bring some cause of action against Francis.

The Court: C. D. Johnson would be out of the case anyway.

Mr. Babcock: I don't think there is much probability of that, but I don't want to make a statement.

Mr. Biggs: Do you see any purpose at all in my being held in this case?

Mr. Babcock: No. [83]

\* \* \*

Mr. Babcock: While we are waiting for Mr. Powers, I might say that I informed Mr. Powers and Mr. Nash last Friday that we were going to abandon the contention we had that decedent [84] was an employee of C. D. Johnson Lumber Company.

The Court: I didn't hear you. You are not going to——

Mr. Babcock: We are going to abandon that contention.

The Court: You are going to abandon?

Mr. Babcock: Yes. We are going to rely simply—he was an employee of Francis and worked at this place and was required to work with Johnson at that place.

The Court: In view of that fact, the probabilities are that Mr. Nash will no longer appear in the case.

Mr. Babcock: He said that he thought he would file a motion for a withdrawal or a form of withdrawal of some kind, and that he didn't think that he would be here in the morning. [85]

\* \* \*

Mr. Powers: Now, you are changing your contentions, as I understand it, very materially from what they were. See if I am correct, now—eliminating from the pre-trial order any claim that the deceased was an employee of C. D. Johnson Lumber Company, either in any special employment, general employment, or employment of any kind of the de-

fendant C. D. Johnson Lumber Corporation. Now, is that clear?

Mr. Babcock: That's correct. [110]

\* \* \*

### Certificate

I, Catherine Mulvey, Official Reporter of Department No. 8 of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I have transcribed into typewriting from the notes of Glenn G. Foster, an official reporter of the above-entitled Court, now deceased, the proceedings had upon pre-trial conferences in the above-entitled cause on May 16 and 22, 1951, and that the foregoing and hereto attached 115 pages of typewritten matter, numbered 1 to 115, both inclusive, constitute a full, true, and accurate transcript of the notes of the said Glenn G. Foster, deceased.

Dated at Portland, Oregon, this 17th day of March, 1951.

/s/ CATHERINE MULVEY,  
Court Reporter.

[Endorsed]: Filed April 5, 1951.

[Title of District Court and Cause.]

Portland, Oregon

June 20, 1950, 10:45 o'Clock A.M.

Before: Honorable Gus J. Solomon,  
Judge.

Appearances:

WILLIAM A. BABCOCK, and  
EMERSON U. SIMS,

Of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,  
Of Attorneys for Defendant.

### TRANSCRIPT OF EVIDENCE

(A jury was duly and regularly empaneled and sworn, opening statements were made by counsel in behalf of the respective parties, and thereafter an adjournment was taken until 2:00 o'clock p.m., of this day, Tuesday, June 20, 1950, at which time the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Sims: Mr. Vincent.

CLYDE C. VINCENT

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

(Testimony of Clyde C. Vincent.)

Direct Examination

By Mr. Sims:

Q. You are Mr. Clyde Vincent and the Mr. Vincent I was talking about to the jury here this morning? A. How is that?

Q. You are Mr. Clyde Vincent? A. Yes.

Q. Do you have trouble hearing me?

A. I did at first.

Q. I will try to keep my voice up a little bit. I said you are the Mr. Vincent that we have referred to this morning in talking about the foreman—— A. Yes, sir. [2\*]

Q. ——at C. D. Johnson Company. About how old are you now, Mr. Vincent?

A. I will be fifty-seven in September.

Q. And you live over at the coast, Toledo?

A. Yes, sir.

Q. And I believe you work for the defendant Johnson Lumber Company, and have for quite a while. Is that right? A. About eight years.

Q. About eight years. And you are still working there now, aren't you? A. Yes, sir.

Q. And in a general way what were your duties—what was your job—last August, 1949, when Dean Hutchens was——

A. Well, sir, I am in charge of the boom crew there in regards to telling the men what time of day to come to work and planning the work to be done, how we are going to take care of the logs, and so on.

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\* Page numbering appearing at top of page of original Reporter's Transcript.



(Testimony of Clyde C. Vincent.)

Q. Would it be an accurate statement for me to suggest that your work is on the water, having to do with the boys that are working on the water?

A. Yes, sir.

Q. Were you on the job the day of the Hutchens accident?

A. Yes, sir.

Q. And did you happen to be on the water that day, or did you happen to be on the dock? [3]

A. I was on the dock.

Mr. Sims: I wonder if we might have the photographs.

Q. We are handing you a group of photographs, Mr. Vincent, through the courtesy of the bailiff, and I am wondering if you can identify those pictures. You can look at them quickly and tell us if you can identify the pictures, know what they are.

A. I would say that is Mr. Dean Hutchens.

Q. All right. Then the next picture.

The Court: Will you please identify them?

Q. (By Mr. Sims): On the back is a number.

A. That is Exhibit—Case No. 5087, Exhibit No. 2. This is a picture of the log dump with a load at the brow log and line tightened up.

Mr. Sims: I wonder, your Honor, if, for convenience's sake, I might continue with the witness and then later offer them in evidence as one exhibit—counsel has already seen them—and then show them to the jury instead of taking them one at a time.

The Court: That is Plaintiff's 3, isn't it?

A. Exhibit 3.

(Testimony of Clyde C. Vincent.)

Q. (By Mr. Sims): All right. Then the next one. You go right ahead, Mr. Vincent, and take the pictures.

A. Well, that seems to be about the same picture of the donkey, perhaps of a different load—Exhibit No. 4. That is [4] taken at a different angle. Not the same load, I don't believe.

Mr. Powers: We would have no objection—we have already waived identification—to having counsel state what they are. He can state what they are.

Mr. Sims: Then I will offer them in evidence and show them to the jury.

Mr. Powers: Well, I think you ought to state what they are.

Mr. Sims: If I may stand by the witness we can look at them together.

The Court: I don't think it is necessary for the witness to look at them. You can just tell what they are.

Will you give them back to Mr. Sims?

Mr. Sims: As I understand it, these are now in evidence—I am offering them in evidence.

The Court: What are you offering in evidence?

Mr. Sims: I am offering Pre-trial Exhibit No. 2 in evidence, and, as I understand it, there is no objection.

The Court: 2 and what else? You have a number of photographs. If you will just list the ones you are offering.

Mr. Sims: 2 to 14, inclusive.

The Court: Any objection?

(Testimony of Clyde C. Vincent.)

Mr. Powers: No. They are offered, I might say, as having been taken at other times and merely as illustrative of the general conditions there, and not to prove any specific fact in this case? [5]

Mr. Sims: I wouldn't want to be limited in that, because, they do prove some specific fact. They show this specific brow log and a photograph of this particular plaintiff. They are not just to be scrubbed off quite that way.

Mr. Powers: Well, at the pre-trial we had on this that is the purpose of them—that is, they were illustrative. As far as the one of the plaintiff is concerned, that, of course, would be his picture. We don't mind that, but this doesn't show the condition as of the time of the accident. I mean these were taken at another time, so all they can do is to illustrate the general circumstances which we want them to go into, but they were not taken on the day of the accident.

Mr. Sims: That is what I am saying.

Mr. Powers: So they will be illustrative as to the general condition, and no objection.

The Court: Exhibits 2 to 14 are admitted.

(The photographs, so offered and received, having been previously marked Plaintiff's Pre-trial Exhibits 2 to 14, inclusive, were thereupon admitted in evidence as Plaintiff's Exhibits 2 to 14, inclusive.)

Mr. Sims: The first photograph that I am hand-

(Testimony of Clyde C. Vincent.)

ing you is No. 2, and that is a photograph of the plaintiff.

No. 3 is a picture, as suggested by the Witness Vincent, showing the dock, two loads of logs, the crane with [6] a sling line under the load tightened.

And No. 4 is a photograph with much the same view, again showing the crane, the dock upon which the crane rests. It does not show, however, the same level that the trucks were required to use. It does show the load and the sling line under the load with the sling line tightened. I am handing this No. 4 to Mr. Powers, and from him to the bailiff, to the jury.

And No. 5 is much the same as No. 4, except a different view. I am handing that to counsel and then to the bailiff.

No. 6 presents the same problem except and with this difference: that this shows the crane at a time when it is at the end of the dock that it travels upon and shows a different view, but it principally shows the level upon which the trucks operate. It shows two loads. It shows a crane with the sling line tightened, and it is taken, as I have suggested, at the end of the dock where the unloading crane travels. That was No. 6, I believe.

No. 7 is——

Mr. Powers: That last one is looking south. I will add that. Is that right?

Mr. Sims: I think that's right, yes. Thank you, Mr. Powers.

The next picture is No. 7, and it shows the same

(Testimony of Clyde C. Vincent.)

operation, but is taken from the level that the crane is [7] traveling.

No. 8 is simply a picture of a truck with a one-log load.

No. 9——

Mr. Powers: What is that, please?

Mr. Sims: That is a picture of a one-log load.

Mr. Powers: No particular truck?

Mr. Sims: No.

No. 9 is a close-up of the trailer end of a load and shows the channel that the cheese block, or whatever we might call it—how do we refer to these?

Mr. Powers: They are called bunk blocks.

Mr. Sims: Well, a cheese block is a bunk block, and it shows the chain that is tightened.

No. 10 is the same as the former picture except it shows the arrangement by which the chain binder is tightened, that tightens the chain that goes around the load.

No. 11 is a close-up that was taken of the channel and the cheese block. It shows the chain that is attached to it. That is No. 11.

No. 12 is a picture showing a chain tied to it, I believe to the trailer. I am not sure. Is that the trailer or the truck? Tied to the truck.

No. 13 is a picture of the dock, itself, without any truck or log on the dock. It is the dock that is involved, [8] and shows three brow logs. It shows the railroad track, and it shows the level of the dock as used by the trucks. It shows somewhat the

(Testimony of Clyde C. Vincent.)

level upon which the unloading crane rests. There are some 4 by 8's, or something of the kind, in the foreground that have nothing whatsoever to do with this particular trial. That is No. 13, I believe.

No. 14 is another picture which was taken from a slightly different angle and discloses the foreground of this operation and the end of the brow log that is involved, shows the unloading crane and the two levels.

Mr. Powers: And looking north?

Mr. Sims: Looking north.

Thank you, Mr. Powers.

The Court: All right, Mr. Sims. I think they are through. You may proceed.

Mr. Sims: May I?

The Court: Yes.

Mr. Sims: Thank you.

Q. Mr. Vincent, on this particular day in question, whereabouts were you there at this landing?

A. I was about eight feet to the right and perhaps ten feet to the front of the truck.

Q. Now, then, could you take these pictures again and indicate from one of the pictures, identifying it by the number that appears on the back, which picture you feel discloses your [9] location? I would suggest, Mr. Vincent, that it might be that No. 14 will help you.

A. Yes, that is a very clear picture.

Q. You remember when I was there?

A. Yes, sir.

Q. And you helped me, I think. What picture,

(Testimony of Clyde C. Vincent.)

Mr. Vincent, are you referring to?           A. No. 14.

Q. And No. 14 shows where you were standing, you say?

A. Well, at the time Mr. Neal asked me for the signal I was sitting on this pile of lumber, or a similar pile, and I got up to see if this boom man was clear.

Q. All right. Now, what did you do to determine if he was clear?

A. I got up and walked over in front of the truck in the middle of this railroad track, practically, and I could see his head down on the boom.

Q. Yes.

A. (Continuing): And I signaled Mr. Neal that he was in the clear.

Q. And——

Mr. Powers: Who was in the clear?

Q. (By Mr. Sims): Well, you mean the man that was on the water?           A. Yes, sir.

Q. Yes. I understood you. And, in other words, there was no [10] person that would be involved in any way or affected in any way by the unloading. That is what you meant, wasn't it?

Mr. Powers: Just a moment. If the witness please, if you don't hear the question, give us a chance to interpose. Now, I would like to have counsel ask him directly what he means. Now, if he means Dean Hutchens, he ought to make it clear to the witness. Is that whom you mean?

Mr. Sims: No, of course not.

(Testimony of Clyde C. Vincent.)

Q. Mr. Dean Hutchens was not a boom man, was he?

Mr. Powers: No, no one contends he was a boom man. A. No.

Q. (By Mr. Sims): Now, you said the boom men were clear. Is that right? And that is what you meant? A. Yes, sir.

Q. And then what was the next thing that happened? Did you then give a signal to Mr. Neal?

A. As I saw the boom man I gave the signal, yes, sir.

Q. And at that time you were standing in front of the truck? A. Yes, sir.

Q. Was it your duty at that time, or has it ever been your duty, to see to it that all men are in the clear both on the water and on the dock at the time of an unloading? A. No, sir.

Q. Is there such a man?

A. No, sir. [11]

Q. Is there such an employee?

A. The only one is the man that is operating the crane. In his judgment everyone is supposed to be in the clear when he dumps the load.

Q. Now, then, would you turn to one of the pictures that you feel discloses best where the unloading engineer is? Which one of those pictures do you think shows that the best? I think 12 or 13, perhaps.

A. Well, I can't see where he is sitting, but it is in front of this donkey facing the log.

Q. All right. Now, what picture is that, please?



(Testimony of Clyde C. Vincent.)

A. No. 7.

Q. No. 7. Thank you. And that is taken in what direction?

A. Well, it was taken from a different brow log, but it was taken from the southerly direction.

Q. That would be, then, faced towards the direction that the trucks approached from?

A. Yes, sir.

Q. The dock runs north and south?

A. Yes, sir.

Q. That's right, yes. Now, what then happened as soon as you signaled that the boom men were then in the clear? What then happened?

A. I believe he proceeded to dump the log immediately.

Q. And who was it that would determine which brow log would be [12] used? Is that the job of the boom foreman or the unloading engineer?

A. That is my job.

Q. That would be part of your job?

A. Yes, sir.

Q. And the unloading engineer—describe that crane, please, a little bit to us. Is it a movable thing?

A. You understand we don't have water to float logs at all times of the day. Therefore we have three brow logs, and when they are not loading we pile them up until we get one piled up as many as we can get in there, and then we move to the other and proceed to the same thing, and when the water comes in they are broken down and floated away.

(Testimony of Clyde C. Vincent.)

Q. About how wide is the dock that the truck drivers have to drive on?

A. Oh, eleven or twelve feet.

Q. And ordinarily—I realize that with the coming in and out of the tides it makes a lot of difference, but about how high is this level of the dock from the water?

A. At low water I'd say fifteen feet.

Q. And at high water it is what? How much less?

A. Oh, six or eight feet, depending on the size of the tide.

Q. Whether it is a high tide or not. Yes. Then this unloading crane is on a dock. We observe that is a little higher than the dock the boys drive on with the trucks. About how much [13] higher is it?

A. Approximately three feet.

Q. About three or four feet, would you say?

A. Between three and four feet; yes, sir.

Q. And then the seat of the chain, itself, is up above the level of the dock that the crane is on how much?

A. About six feet.

Q. How is this unloading crane moved?

A. Well, it is a converted steam shovel, and it travels on tracks that is driven by gears from the main engine.

Q. Would it be a fair statement for me to say it is the wide caterpillar-type of traction?

A. Yes, sir.

Q. And is it moved up and down then to accom-

(Testimony of Clyde C. Vincent.)

moderate the particular brow log you are going to use?      A. Yes.

Q. Is that right?      A. Yes.

Q. Who was the unloading engineer there that day, if any?      A. How is that?

Q. Who was the unloading engineer?

A. Mr. Fred Neal.

Q. That was Mr. Neal. And he has been there about how many years, if you know?

A. Well, he was there before I was, and I came on that particular [14] job six years ago, and I believe and I think he was there perhaps two or three years before I was.

Q. You have already testified by whom you are employed, but by whom is Mr. Neal employed?

A. The same party.

Q. The C. D. Johnson Lumber Company?

A. Yes, sir.

Q. And whose dock is this?

A. C. D. Johnson Lumber Company.

Q. And whose unloading crane?

A. C. D. Johnson's.

Mr. Powers: That is all admitted.

Mr. Sims: Descriptive.

Mr. Powers: I don't see how. It is all admitted, and no need of taking time on it.

Mr. Sims: All right.

Q. And how is the log, or are the logs, the load, unloaded? How is that done? Will you take that

(Testimony of Clyde C. Vincent.)

step by step and tell us—after the truck comes in there with a load of logs?

A. Well, as the driver drives in to the brow log the man on the donkey swings the block and the lines along with the load something along near the center of the load. When he gets to the proper position to unload that log he is given a whistle signal to stop. If he happens to go too far ahead he is whistled to back up. Then the driver proceeds to get out of his truck, [15] take this line, this unloading line, which is laying on the line which he drives over, puts it over the reach, and puts it onto the block, and that is immediately tightened up, and then he proceeds to take off his chains unless he unfastens the hooks that fastens his bunk chains or bunk blocks, and then he is supposed to be ready to dump his load, and the procedure from then is for that truck driver to see that the boys are clear on the water, and if there is two there you will see one man usually knock one chain, one rear end chain, and the other man will knock the front end chain. That is when they are quite busy, you know, and each truck driver is trying to help the other fellow along to save time. At that time there is a signal man at each end, as a rule, and gives us a double check.

Q. And that is a practicable—

A. (Continuing): And if a man is alone it saves him from walking from the back end to the front end.

Q. May I ask this, Mr. Vincent: From your ex-

(Testimony of Clyde C. Vincent.)

perience is that a practical sort of an arrangement for there to be two men to work together?

Mr. Powers: That is a question for the jury, a question of law.

Mr. Sims: Practicability? We charge it was practical for them to have the extra man there. The evidence will show, of course, that at this time there was no other truck driver there. [16] I believe it will.

The Court: You are claiming that this man, Mr. Vincent, is an expert?

Mr. Sims: Yes, your Honor; he is. He has worked, he said, eight years, and was a foreman there in charge of this particular operation.

The Court: What did you do prior to the time you were a boom foreman for C. D. Johnson Lumber Company?

A. I worked for the Linn County Logging Company.

The Court: Were you a boom foreman then?

A. No, sir.

The Court: How long have you been in the industry?

A. I worked for Mr. Carey, I guess, ten or twelve years before I came there, building deep sea rafts.

The Court: Building deep sea rafts?

A. Yes, sir.

The Court: How long have you been in the logging and sawmill business?

A. About twenty years.

(Testimony of Clyde C. Vincent.)

The Court: Twenty years.

I am going to let him answer the question and give you an exception.

Q. (By Mr. Sims): Do you know what my question is, Mr. Vincent?

The Witness: Repeat it.

(Last question read.) [17]

A. As to safety—well, there is a question there in my mind. At times we have four or five around there, and it is pretty hard to look after them all, don't you see.

Q. That's right.

A. (Continuing): And therefore the man on the donkey has that extra man around there that he has to watch, and the more there is around there the more you have got to watch. I also operate the unloading rig, you understand.

Q. You have operated the crane that is in use—in fact, the very crane we have the picture of, haven't you?

A. Yes, sir.

Q. All right. And, seated, as the crane operator is, or as you are when you are the crane operator, does it become your duty as a part of the operation of the crane to see that the men are in the clear before you unload?

A. Yes, sir.

Q. You mentioned that there is a whistle signal. From your experience in this field, Mr. Vincent, would it be a practical, safe sort of an arrangement for there to be a whistle signal as the sling line is tightened and the unloading takes place to give a

(Testimony of Clyde C. Vincent.)

further warning to everybody within the sound of the whistle and in that area that there is an unloading taking place?

Mr. Powers: We object.

Q. (By Mr. Sims): Could that be done? Could there be a whistle? [18]

A. It could be done, but I don't see it would make it any safer.

The Court: Just a minute.

Mr. Powers: I will withdraw the objection. The witness stated he didn't see it would be any safer to have a whistle.

Q. (By Mr. Sims): Could there be such a whistle?

Mr. Powers: I will object to that. The question is a safety measure.

The Court: I will sustain that objection.

Q. (By Mr. Sims): About how much higher—I may have asked you this—is the level upon which the crane moves than the level upon which the trucks drive? I asked you from the height of the water up, and that varies, you said, according to the tide?

A. Yes, sir.

Q. And I asked you the elevation that the crane operator was above you, but I am not sure that I asked you this other question. Would you give us the benefit of that, the difference in the level of the floor the trucks are on and the floor that the crane is on?

A. I stated between three and four feet, I think.

Q. Thank you. I wanted to be sure that was cor-

(Testimony of Clyde C. Vincent.)

rect. Now, on this particular occasion, about what time of day was it that Dean Hutchens drove in there?

A. To the best of my knowledge, around 9:00 or 9:30.

Q. And what kind of a load did he have? [19]

A. A one-log load.

Q. And did you observe whether the truck was spotted by Mr. Neal, or did you do that?

A. Mr. Neal did that.

Q. And then what is the next thing that Dean Hutchens did?

A. Well, I can't recall. I don't recall that I ever saw him even get out of the truck, as far as that goes.

Q. When is the first time that you saw him?

A. Oh, I suppose two or three weeks before the accident.

Q. I mean on this particular day.

A. Oh, I suppose I saw him get out of the truck, but as to his actions that he went through there I can't remember. It is a routine. That happens two hundred times a day. How could you expect a man to remember all those actions?

Q. That's right. Well, when is the first distinct recollection you have of Dean Hutchens on that particular occasion? Was it after the unloading?

A. After the unloading; yes, sir.

Q. And where was he at that time?

A. He was laying to the side of the rear end of the trailer.



(Testimony of Clyde C. Vincent.)

Q. And where was that with relation to the brow log?

A. At the north end of the brow log.

Q. And what was the situation then at that time?

A. Well, he appeared to be crushed.

Q. And did you make any examination of the trailer to determine [20] whether the chain was or was not removed?

A. Well, we all looked at it there. There was three of us, and everything was ready to dump the load, as far as we could see.

Q. As I understand it, you don't know whether there was a chain on or not when he was spotted there at the brow log. You don't know whether those chains had been removed before or after he stopped?

A. No, sir; I don't know whether there was a chain on there when he come there or not.

Q. What other man or men were there around there at that particular time?

A. Well, the donkey operator, myself, and Mr. Spoor was all that happened to be there at that particular time.

Q. And was Mr. Spoor employed by C. D. Johnson Lumber Company, or was he another truck driver?

A. Mr. Spoor was employed by the C. D. Johnson on the boom.

Q. Well, he was on the water?

A. He was on the water at that time.

Q. Were there any other trucks ahead of the

(Testimony of Clyde C. Vincent.)

Hutchens truck, or closely behind it, as you recall?

A. Well, we had perhaps dumped a load of logs just ahead of that. I don't remember how long ahead of that.

Q. There is one thing that we haven't covered at all, any of us, and that is this business after the trucks were unloaded. How [21] did they get off of this dock?

A. Well, there is a kind of a circle they go around and come back onto the tramway again.

Q. And is that fact disclosed by one of these pictures, this turnaround?

A. I don't believe—well, you can see a part of it here, yes, on this picture, here (indicating).

Q. And that is picture No. what?

A. Well, it is 6, I suppose—8 has been marked out on this particular—it is No. 6.

Q. No. 6 shows the turnaround?

A. Well, it shows where it comes back onto the tramway, here.

Q. To the best of your recollection, Mr. Vincent, was there any other truck driver around near there at this time?

A. No, sir.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Mr. Vincent, just a question or two. After the accident occurred and you went back—that is when you knew the deceased had been crushed—now the

(Testimony of Clyde C. Vincent.)

log, itself, what had become of it? Had it gone down into the Yaquina River into the Bay?

A. Yes, sir.

Q. It had gone over the brow into the water?

A. Yes, sir. [22]

Q. Now, at Yaquina Bay or River, you mentioned a tidal flow, there. It is affected by the tide from the ocean, isn't it? A. Yes, sir.

Q. And it is tidal water in there?

A. Yes, sir.

Q. The water, itself, as I understand it, is a public stream, navigable stream?

A. Yes, sir.

Q. And not the property of C. D. Johnson Lumber Company?

A. Supposed to belong to the Government, I believe.

Q. Now, when you get the logs in the water, what is done with them? Are they put up in rafts, in booms? A. Boom sticks.

Q. They are put up in boom sticks and hauled away, there, are they? A. Yes, sir.

Q. Then in determining whose log that is, who brought the log in, that, then, is the job of the scaler. Is that right? A. The log is branded.

Q. The log is branded when it comes in, but you say it is put into boom sticks? A. Yes, sir.

Q. Then somebody has got to determine who brought that log in? A. Yes, sir.

Q. And that would be Mr. Calavan, would it? Isn't he the scaler? [23] A. That's right.

(Testimony of Clyde C. Vincent.)

Q. So the logs of Francis, or the logs the deceased, Dean Hutchens, was hauling, they would have the brand on them? A. Yes, sir.

Q. And you could tell they brought the logs in from that brand? A. Yes, sir.

Q. Well, Mr. Vincent, in giving the signal you mentioned—the engineer, there, is the one that lifts the log. Now, who gives the signal to the engineer that the unloading operation is in the clear and go ahead with it? A. The truck driver.

Q. That is up to the truck driver, isn't it?

A. Yes, sir.

Q. And I think it is your testimony that one truck driver could give that signal as well as two?

A. Well, certainly.

Q. And it might be a little safer not to have two around so that you would have two to look for. Is that right? A. That is my contention.

Q. Now, whose work is it to get that load ready for lifting and dumping into the water?

A. The truck driver.

Q. Is there any employee of the C. D. Johnson Lumber Company that attempts to go down and get that load ready, or is that done entirely by the truck driver? [24]

A. Done entirely by the truck driver.

Q. And that equipment on the truck, the bunk blocks and the binder chains, that is all part of the truck equipment, isn't it? A. Yes, sir.

Q. And the only equipment that C. D. Johnson has there at all is the sling line that he gets around

(Testimony of Clyde C. Vincent.)

his load and attaches onto the line from the crane, outside of the brow log?      A. And the donkey.

Q. And the donkey. But I mean of any moving equipment around there. All this other part is the truck and the chains and bunk blocks, and they all belong to the truck?      A. Yes, sir.

Q. Now, then, after the log is unloaded, what does the truck driver do with respect to getting his trailer back upon his truck there so he can haul it away?

A. He puts his bunk blocks back in the channel and fastens his chains so that they don't tangle around, and proceeds to hook the hook onto the loading block, onto the trailer, and pick up the—the donkey engineer picks up the trailer and sets it on the back of his truck.

Q. But in that work in handling the truck, in making the truck ready for unloading, that is done by the truck driver; he fastens all the wires and cables, and so on?      A. Yes, sir.

Q. And looks after the equipment? [25]

A. Yes, sir.

Q. And it is the truck driver that gives the signal to go ahead and unload?      A. Yes, sir.

Q. Now, you never give that signal to unload, do you?      A. No, sir.

Q. And this signal that you were talking about giving, what did that signal relate to—when the boom man was in the clear?      A. Yes, sir.

Q. That is all that related to, isn't it?

A. Yes, sir.

(Testimony of Clyde C. Vincent.)

Q. Now, it was stated here this morning by Mr. Sims that you should have checked up on the driver to see where he was.

Mr. Sims: Now, just a minute. If the Court please, I think we ought to confine ourselves somewhat to the facts. I did not make that statement, to my recollection. I said that if it had been the duty——

The Court: It doesn't make any difference at all.

Mr. Sims: It is cross-examination.

The Court: His statement is not evidence.

Why don't you ask him the question?

Mr. Powers: Well, since he hasn't developed it in his case, I won't go into it, if that is the case, if he isn't going to intend to prove what I thought he said he was.

The Court: The jury is to disregard the gratuitous remarks [26] of counsel.

You are through with this witness?

Mr. Powers: I wanted to ask one other question.

The Court: All right.

Q (By Mr. Powers): Mr. Vincent, after the accident was over, as I understand your testimony, the three of you that examined the truck there found that the truck was all ready to be unloaded?

A. Yes, sir.

Q. There were no broken chains or anything like that, were there?      A. No, sir.

Q. Now, was there, in fact, any binder chain around there anywhere that you saw?

A. Not at the rear end of the truck.

(Testimony of Clyde C. Vincent.)

Q. Well, did you see a binder chain anywhere? Did you look around?

A. I don't recall whether I looked in what they call the jockey box or not, but I do remember Mr. Calavan coming immediately after and saying, "Well, no loose chains or anything around."

Q. You can't say that; just what you saw. You didn't see a loose binder chain around the area of the truck?

A. No, sir.

Q. Now, can you explain to the jury, if you please, the difference between what counsel has referred to as a binder chain [27] and a bunk chain—and I have in mind particularly the length of a binder chain. Can you tell the jury what a binder chain does?

A. Well, sir, a binder chain is about 16 foot long, on the average, and it is made of somewhat lighter material than the bunk chains. The bunk chain is perhaps 8 feet long and goes immediately through the end of the bunk, a hole approximately that large (indicating). It is fastened on one end to the cheese block, or the bunk block, and on the other end it has a hook that you can regulate the length by when we want to tighten up the load.

Q. Now, is a bunk chain ordinarily fixed so that you can release it from either side?

A. You can release the brow log side from the opposite side——

Q. Yes.           A. ——of the brow log.

Q. And that is all that is required. As I understood your testimony, you are not exactly certain whether you saw the deceased get out of the cab.

(Testimony of Clyde C. Vincent.)

You may or may not have seen him, but you did not see him again until after the accident occurred. Is that right?      A. Not to my knowledge.

Q. You never saw him at any time, did you, between the load, this log load and the brow log?

A. No, sir. [28]

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. Just a minute. You say that the binder chain would be perhaps 16 feet long. About what would be the value of that chain?

A. Well, sir, I don't know.

Q. And do you have any idea what the value of the bunk chain would be?      A. No, I do not.

Q. Now, getting back to this matter of a signal, would it be a practicable thing to have one man whose sole duty was to see that the truck driver was in the clear, or truck drivers were in the clear, and also that the men on the water would be in the clear so that there would only be one man giving the signal instead of one man looking at the water and somebody else doing something with reference to the water?

The Witness: Would you repeat that again?

Mr. Powers: Now, let me just say that Mr. Vincent has testified that it is up to the truck driver to look in the water, and after looking in the water to give the signal, and he testified to that, your Honor.

Mr. Sims: Well, counsel knows it is a non-



(Testimony of Clyde C. Vincent.)

delegable duty on the part of the employer, and I think it is a part of our case and my duty to this jury to develop whether it is a [29] practicable thing to have a safety man on the dock so there will be only one signal. It is true that what they are doing is letting the truck drivers do some signaling. I am asking if it wouldn't be a practicable thing to have a man whose sole duty would be to see that everybody was in the clear.

The Court: Objection overruled. You may answer the question, Mr. Vincent.

A. Well, as I have said before——

Q. (By Mr. Sims): Well, you answer "Yes" or "No," and then give your explanation.

A. No.

Q. You don't think it would be practical?

A. It can be practical, yes, but from a safety standpoint I can't see as it would improve things.

Q. If you had not been the boom foreman, if you had been such a safety man, would this accident have occurred?

A. Well, any man is subject to a mistake. That particular accident might not have happened; some other might happen.

Q. But this particular accident——

Mr. Powers: We will object to that, your Honor.

The Court: I think he is going too far. I will sustain the objection.

Mr. Powers: I move that that question and answer be stricken. It is not proper.

The Court: Well, you didn't object to it. [30]

(Testimony of Clyde C. Vincent.)

Mr. Powers: How did I know what he was going to say? I am objecting to it now and move it be stricken. It invades the province of the jury and is not a proper question, what might have occurred. It is the highest form of speculation you can call for.

Mr. Sims: As I understand it, your Honor, he was facing this truck so that his view was straight down the brow log, and that is the reason I felt that was a proper question.

Q. It would have been, in other words, a safe practice to have one man to do all of the signaling for the unloading?

Mr. Powers: I move that it be stricken.

The Court: I am going to strike the answer, and the jury is instructed to disregard it.

Q. (By Mr. Sims): From your view there in front of this truck, had your attention been called down the length of the brow log, were you in a position where you might have seen Dean Hutchens?

A. No, sir; I was not.

Q. You were over too far. Is that it?

A. I was practically in the center of the truck, there, in the cab, and it would have prevented me from seeing it.

Q. I believe you said it was the duty of the unloading engineer to see that the men were in the clear?

A. That's right.

Mr. Sims: That is all. [31]

(Testimony of Clyde C. Vincent.)

Recross-Examination

By Mr. Powers:

Q. Well, now, you are familiar with the Logging Safety Code that prohibits a driver from going between the load and the brow log, are you not?

A. Yes, sir.

Q. It is against the law for anybody to be in there where he thinks you ought to have seen him. Is that not correct?

Mr. Sims: Just a minute. If the Court please, it is not up to a witness to pass upon what the law is and advise the jury as to the law.

The Court: No, I don't think——

Mr. Powers: What I was getting at, your Honor, is that if there is somebody else there that he should have been looking between the brow log and the log. Now, I submit to your Honor that it is important, then, for the jury to know at this point whether anyone would expect any driver to be between the log load and the brow log, because of that safety provision.

The Court: Just one second.

Mr. Powers: Yes.

The Court: That is not the question and not the question that was objected to, and the objection will be sustained. The objection goes to the question you are asking this witness, whether it wasn't against the law for a person to be between the brow log and the truck. [32]

Mr. Powers: Yes; I was asking him if he were

(Testimony of Clyde C. Vincent.)

familiar with that, the same as I would ask someone if he were familiar with the red light, whether he should go across the street or whether he should look for someone. That is the only point.

The Court: The jury is instructed to disregard the statements of counsel.

Q. (By Mr. Powers): Well, I will put it this way——

Mr. Powers: Well, that is all, Mr. Vincent.

Mr. Sims: That is all. Thank you, Mr. Vincent.

(Witness excused.) [33]

Mr. Sims: Mr. Neal.

### FREDERICK MILES NEAL

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Neal, to introduce you a little more, as I understand it, you are the unloading engineer——

A. Yes, sir.

Q. ——that we have been referring to. Is that right? A. That's right.

Q. And about how old are you, now, Mr. Neal?

A. How is that?

Q. About how old are you now?

A. I am seventy-two.

The Court: Mr. Sims, will you speak up?

(Testimony of Frederick Miles Neal.)

Mr. Sims: Yes, I will.

The Court: I'll tell you, you might be better off——

Mr. Powers: Oh, we can hear him if he speaks up.

The Witness: I can hear him. I was just a little confused as to what he asked me.

Q. (By Mr. Sims): Mr. Neal, in a general way, what are your duties for the Johnson Company?

A. Operating an unloading donkey.

Q. And how many years' experience have you had? [34]

A. I have unloaded, I guess, for close to fourteen years, now, twelve to fourteen.

Q. And about how many years' experience have you had in the logging industry, sawmill industry?

A. Oh, I have been with the Company twenty-five years ago last September.

Q. That is the Johnson Lumber Company?

A. Yes, sir.

Q. And you are still employed there?

A. Yes, sir.

Q. And what type of operation is this, this particular unloading? I am referring first, now, to it on a busy day. About how many trucks will come in there and discharge a load?

A. At that particular time, I imagine there was twenty trucks, twenty trucks coming in a day. That is twenty different trucks making several loads apiece.

(Testimony of Frederick Miles Neal.)

Q. And how many trips would those twenty trucks make in there?

A. Well, I couldn't judge as to how many they would make, but on an average from that particular operation they made about four.

Q. In other words, you would unload about 80 loads of logs?

A. I imagine at times we did, and sometimes more and less. It varied according to the circumstances in the woods and how they loaded out.

Q. Do you remember the day of this Hutchens accident? [35]

A. Yes, sir.

Q. About what time of day?

A. I think I gave it in about 9:30, if I remember right.

Q. Had you unloaded other trucks before Dean's—

A. Yes, sir.

Q. —and there were other trucks waiting to be unloaded?

A. Not at that particular time, I don't believe.

Q. What kind of a load did he have?

A. He had a one-log load.

Q. Do you remember anything of the dimensions of that log?

A. I never measured it. I would just guess at it; that's all.

Q. Well, give us your best impression as to its size.

A. I imagine it was 48 inches on the small end, possibly 48 feet long.

(Testimony of Frederick Miles Neal.)

Q. And when that load came in, who indicated where the truck was to stop?

A. I didn't get that question.

Q. Who indicated where the truck was to stop?

A. I did.

Q. And how?

A. With a blast of the whistle, steam whistle.

Q. That is a good, loud whistle?

A. Yes, sir.

Q. And how many blasts?

A. One blast to stop. [36]

Q. All right. Then what was the next thing that was done?

A. Well, of course, the operator of the truck came from his side around the front, and he unloosened the first bunk block—that is, taking the hook loose—passed by and picked up the line, and hooked it on the block that had swung alongside of the log as they came in, passed the second block, and fastened the hook from the bunk block on that, and went to the rear end of the machine and the rear end of the log pointing on the north end.

Q. Now, then, how are the chains when there is one log fastened at the bunk or trailer?

A. They often fasten from one bunk to the other—that is, from one end of the bunk to the other over the top of the log.

Q. Now, at the trailer what do they do?

A. That is on the trailer or either bunk, front or trailer.

Q. Do they actually tie this chain?

(Testimony of Frederick Miles Neal.)

A. I never examined the back, exactly how they are put on, but evidently they are fastened solid next to the brow log with a binder chain on the truck.

Q. To refer, now, to one log, when there is a one-log load, is it a practice, a safety practice, to tie, to actually tie, the chain at both sides of the trailer?

A. You mean to bring it under the log and tie both sides?

Q. I mean at the loading of this one log before they go out on the highway do they take their binder chain and actually tie it [37] in a knot on both sides of the trailer?

A. I wouldn't say that they tied a knot. It is fastened.

Q. That is what I mean. A. Yes, sir.

Q. It is fastened? A. Yes.

Q. And in order to be unfastened, it has to be unfastened from both sides of the trailer, doesn't it?

A. Well, you can unfasten one end at a time.

Q. Yes. You unfasten one end at a time?

A. That's right.

Q. So in order to take a chain, a 16-foot chain, or whatever the length is, and put it back into the truck, it has to be untied from both sides of the trailer?

A. Yes, sir; if you take it off, that's right.

Q. Yes. Now, then, after Dean Hutchens had pulled the sling line under the log, did you then tighten it?

A. As soon as he hooked on with the block.



(Testimony of Frederick Miles Neal.)

Q. You tightened it?

A. Yes, sir. I didn't tighten it; I brought it up taut.

Q. That is what I mean by "tighten." You made it——

A. Yes, sir.

Q. Now, then, as you sat, now, in this crane, did you have a wide-open view of that dock up and down?

A. I do. [38]

Q. So that you could readily see if a man is standing there?

A. Yes; if he is behind the log or off from the end I can see him. Direct from the end, I might not if he was behind it.

Q. And as I understand it, you got a signal from Mr. Vincent that the water was clear?

A. He gave me a signal after I had asked him to go and look.

Q. Yes. What is the next thing you did?

A. Well, I had had a signal from——

Q. Now, was——

Mr. Powers: Just a minute. I think this is his witness, and the witness is trying to explain.

The Court: This witness works for the Company. Objection overruled.

Mr. Powers: Well, there is no showing of any adversity.

The Court: He is employed, and there is an inference, Mr. Powers. This man is employed and has been employed by the defendant for twenty-five years.

Mr. Powers: That's right, but he hasn't made

(Testimony of Frederick Miles Neal.)

any mention of being an adverse witness, and under the statute it takes a particular showing to make him an adverse witness, so we will object to this proceeding on the part of counsel.

The Court: Objection overruled.

Mr. Sims: Would you read the question?

(Last question read.)

A. After I had been signaled from both sides, both ends, I [39] proceeded to dump the logs.

Q. After you got the signal from Mr. Vincent, did you get any signal from Dean Hutchens?

A. I had before.

Q. After you got the signal from Mr. Vincent?

A. No, sir; before.

Q. After you got the signal from Mr. Vincent, did you even look to see where Dean Hutchens was?

Mr. Powers: Now, I should like to object to this, arguing with the witness.

The Court: Sustained.

Q. (By Mr. Sims): Was Dean Hutchens——

Mr. Powers: What was the Court's ruling?

The Court: I ruled I sustain your objection.

Mr. Powers: Thank you.

Q. (By Mr. Sims): Where was Dean Hutchens at the time Mr. Vincent signaled to you?

A. When Mr. Vincent signaled to me, when I turned my head to Mr. Vincent, Dean, or Mr. Hutchens, was standing at the end of the log possibly four or five feet from the end.

Q. And then Mr. Vincent walked to the edge of the dock. Is that right?      A. That's right.

(Testimony of Frederick Miles Neal.)

Q. And after he walked over to the water, then did he walk back to the middle of the track? [40]

A. Came back to the side.

Mr. Powers: Object to this leading, again, your Honor.

The Court: Objection overruled.

Q. (By Mr. Sims): Go ahead, please.

A. He came back in sight of me.

Q. Then after he got—what distance did he walk? In other words, about how wide is this dock he walked across?

A. About fourteen or fifteen feet from the lumber pile he was sitting on.

Q. So he walked 14 feet over, and then he walked how many back?

A. I should say six or seven, maybe.

Q. Feet back. So, altogether, you think he may have walked about 20 feet?

A. Well, I would say close to that, possibly, altogether.

Q. Now, after he did this walking and this signaling, did you look to see where Dean Hutchens was? A. I didn't.

Q. What? A. I did not.

Q. At the time you applied the power, then you didn't know where Dean Hutchens was?

A. I had pulled the block up tight and got a signal from both ends.

Q. I am asking a question, and please, Mr. Neal, would you answer my question? [41]

Mr. Sims: Would you read it, please?

(Testimony of Frederick Miles Neal.)

The Witness: How was that question?

Mr. Sims: He will read it.

(Last question read.)

A. Well, when I rolled the log, I didn't.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Had Dean Hutchens given you a signal to roll the log? A. Yes, sir.

Q. And where was Dean Hutchens when he gave that signal for you to roll the log?

A. He was about four or five feet from the end of the log facing me. That is on the north end.

Q. And what kind of a signal did he give you? How did he signal you that all was in the clear and roll it?

A. He gave me a nod of his head and with one hand or the other he motioned over.

Q. And that meant, "Go ahead," did it?

A. How is that?

Q. What did that mean to you?

A. That meant for me to go ahead.

Q. And then after you got that signal, then in addition to the signal from him you asked Vincent to look over and see if the pond man was actually out of the way? [42] A. Yes, I did; yes, sir.

Q. And Vincent gave you the signal that he was out of the way, and you went ahead?

A. Yes, sir; he did.

(Testimony of Frederick Miles Neal.)

Q. Now, when a truck driver gives you a signal to unload, where do they go,—where do they stand?

A. Well, I wouldn't say where all of them stood, but they get in the clear, as what we consider the clear.

Q. They never go between that brow log and the log to be unloaded, do they? A. No.

Q. Now, Mr. Neal, when a truck driver comes up, who makes his load ready for unloading? Is that the truck driver, himself? A. Yes, sir.

Q. You have nothing to do with that, do you?

A. Only to tighten the line.

Q. But you don't go down where the truck is, and you are a distance away from him, aren't you?

A. Yes, the full length of the boom as it extends over.

Q. About what distance would you be away from that truck? A. I would say eight or ten feet.

Q. Yes. And he gets his load ready for unloading? A. Yes, sir.

Q. And he casts his binder chains off, and he puts the sling cable over and hooks onto your [43] line? A. Yes, sir.

Q. And you make it taut. Then he takes the bunk block out, or whatever he has got to do?

A. Yes, sir.

Q. And then does he look to see if the pond is clear? A. He is instructed to that effect.

Q. And he looks to see whether there is anybody right underneath the pond? A. That's right.

Q. Now, in looking down at the pond where this

(Testimony of Frederick Miles Neal.)

is unloaded, is he required to go between the truck and the brow log?      A. No, sir.

Q. Could he actually see down below from that point, or is the brow log too high for him to see out over there?

A. He couldn't see underneath the brow log.

Q. He can't see over there. Well, now, this day would you state to the jury whether he had any binder chain on the log when he came in there?

A. I can't say for sure that he did. He could have had, but I don't remember him ever taking it off, because he came right by from one bunk to the other with the hook, put the line on the hook, and knocked the dog out of the rear bunk and right onto the end of the log, and I don't remember him taking the chain over.

Q. Well, now, after the accident occurred, did you find any [44] binder chain there, any chain 16 feet long?      A. I never looked for a chain, no.

Q. I see.      A. I didn't see any chain.

Q. But in any event, the log was all ready as far as being loosened and ready for being rolled when you rolled it?      A. Yes, sir.

Q. And that had been done by the deceased?

A. Yes, sir.

Q. Now, counsel made the suggestion this morning that the deceased had given you a sign he was going in between the brow log and the truck. Now, tell the jury whether there is anything like that that happened.

A. He never gave me the signal ever.

(Testimony of Frederick Miles Neal.)

Mr. Sims: Just a minute.

The Court: Objection sustained.

Q. (By Mr. Powers): I will ask you, did he give you any signal other than the signal to go ahead and roll the log? A. No, sir.

Q. And there is no question but what he gave you that signal, is there?

A. There is no question.

Q. Now, about how long would it be between the time he gave you the signal to roll it and the time that Vincent told you the pond was clear? I will ask you whether it was a matter of more [45] than seconds?

A. Just long enough for Mr. Vincent to walk to the edge of the dock and back in my sight again, and you can guess your time. I couldn't. It is a matter of seconds, I imagine.

Q. Then, as I understand it, from the time that the deceased gave you the signal——

A. Yes, sir.

Q. ——to hold your load down and Vincent went over the 15 feet and a few feet back and you went ahead, and you didn't see him from then on?

A. I didn't.

Q. But before you rolled it he gave you that signal?

A. He was standing and gave me the signal from behind.

Q. What did you expect him to do,—to get in the clear or not?

A. He was already in the clear.

(Testimony of Frederick Miles Neal.)

Q. Yes. And did you expect him to stay in the clear? A. I did.

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. Mr. Neal, whose duty is it to see that the men are in the clear before the power is applied to the log to unload it?

A. See that the driver is in the clear?

Q. Yes.

A. Well, we are not supposed to unload until he is in the clear. [46]

Q. And you didn't look again to see if he was in the clear and didn't know where he was when you applied the power, did you?

A. I didn't see him a second time.

Mr. Sims: That is all.

### Recross-Examination

By Mr. Powers:

Q. Well, now, when you say it is the crane engineer's duty to see that things are in the clear, whom do you get your signal from?

A. I use my own judgment.

Q. Well, I mean, would you ever unload without the truck driver giving a signal there?

A. No, sir.

Q. That is the truck driver's business to tell you to go ahead, isn't it? A. That's right.



(Testimony of Frederick Miles Neal.)

Q. And it is the truck driver who checks up to see when the boom man is out of the way, isn't it?

A. He is supposed to be responsible for that part of it.

Q. In going ahead with your movement, you rely upon the signal given you by the truck driver to roll?

A. I do.

Q. You have to, don't you?

A. I have to. [47]

Mr. Powers: That is all.

#### Redirect Examination

By Mr. Sims:

Q. You relied upon Mr. Vincent's signal, and on that signal you applied the power and unloaded, didn't you?

A. Yes, sir.

Mr. Sims: That is all.

#### Recross-Examination

By Mr. Powers:

Q. Well, now, wait a minute. Let's get this straight. Did you check up—was Mr. Vincent checking up to see whether Mr. Hutchens was between the brow log?

A. No, sir.

Q. Was Mr. Vincent doing anything other than seeing if the pond was clear?

A. As far as I could——

Q. Did you ask him to do anything other than check the pond?

A. I did. I asked him to look.

(Testimony of Frederick Miles Neal.)

Q. To look where?

A. I didn't talk to him. I motioned him over.

Q. To look in the pond? A. Yes, sir.

Q. And the only signal you were getting from him was that the pond was clear?

A. That's right. [48]

Q. And you had already had your signal from the truck driver to roll? A. Yes.

Mr. Powers: That is all.

The Court: Have you any more questions?

Mr. Sims: I think not, your Honor.

The Court: That is all, Mr. Neal.

(Witness excused.)

The Court: How long is your next witness?

Mr. Sims: I think about a half an hour, your Honor.

The Court: We will then take a 10-minute recess.

(Recess.) [49]

The Court: Call your next witness.

Mr. Sims: Mr. Francis.

### WILLIAM R. FRANCIS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Francis, you live out at where?

(Testimony of William R. Francis.)

A. Sheridan.

Q. Sheridan, Oregon? A. Yes, sir.

Q. How long have you lived out there?

A. About 1925, I think.

Q. And are you the Mr. Francis that had a logging contract with the C. D. Johnson Lumber Company? A. Yes.

Q. And in carrying on that contract did you have the use of trucks and truck drivers?

A. Yes.

Q. What were those truck drivers required to do, particularly relative only to the landing at Toledo? Were they required to drive in there with their loads?

A. They were required to get a load and to deliver it to Toledo.

Q. And to whose property?

A. C. D. Johnson. [50]

Q. C. D. Johnson Lumber Company?

A. Yes.

Q. And did you pay the Johnson Lumber Company for the use of its dock?

A. They withheld a small amount from my check.

Q. They held out of your check for what service?

A. It said "Dumping."

Q. For the unloading? A. Yes.

Q. Did the C. D. Johnson people furnish the unloading crane? A. Yes.

Q. Did they furnish the unloading engineer?

A. Yes.

(Testimony of William R. Francis.)

Q. And the boom foreman? A. Yes.

The Court: One second. Can the members of the jury hear Mr. Francis?

(Various responses.)

The Court: Will you speak a little louder, Mr. Francis?

The Witness: Yes, I will.

The Court: Mr. Sims, will you go behind that jury box?

Q. (By Mr. Sims): Mr. Francis, as I understand your last answer, you said your logs were dumped there at the C. D. Johnson Lumber Company place at Toledo. Is that right?

A. Yes. [51]

Q. And that you paid to them or they held out of your check for the services of the dock, the unloading engineer, the crane, the boom foreman, and such of their employees as were necessary to unload the trucks? A. Yes.

Q. Were you truck drivers, or all of those who hauled the logs of C. D. Johnson Lumber Company, required to go to that particular unloading dump?

A. Yes.

Q. And were they required to assist the employees——

Mr. Powers: This is all leading.

The Court: I think so.

Mr. Powers: Ask him what happened.

Q. (By Mr. Sims): What happened? What were they supposed to do there at Johnson's?

(Testimony of William R. Francis.)

Mr. Powers: I think we ought to confine it to the deceased, here.

Mr. Sims: Dean Hutchens. Very well.

A. Well, I don't really know. All I could go by, the other dumps I have worked at and the like.

The Court: I can't hear a thing.

Mr. Sims: Will you raise your voice, Rouleigh? We can't hear you.

A. I believe that they were required to dump their loads, to assist the dumping. [52]

Q. (By Mr. Sims): Well, let me ask you this: Was he required to drive his truck in there under the unloading crane? A. Well, yes.

Q. And then when he got there, was he to assist——

Mr. Powers: Now, we will object to his assisting.

Q. (By Mr. Sims): Well, what was Dean Hutchens to do when he drove in there with your logs?

Mr. Powers: The contract is the best evidence. The parties put it in writing. It is the contract to deliver the logs there and they would put the sticks in the water.

Mr. Sims: There is no evidence that there was any written contract of any kind between these drivers. I don't think that is a fact.

Mr. Powers: You are talking about——

Mr. Sims: I am talking about Dean Hutchens, what he was required to do and was expected to do.

Mr. Powers: They can't change this written contract they have with us.

(Testimony of William R. Francis.)

The Court: Did you say earlier in your opening statement the contract was changed by mutual agreement between Francis and C. D. Johnson?

Mr. Powers: Yes, there was a modification of it.

The Court: What was that modification?

Mr. Powers: The modification was, as I understand it, instead of dumping the logs at Newport some 14 miles away and having [53] them rafted up, which would have cost about 75 cents a thousand, I think, Mr. Francis, here, wanted to dump them at this particular dump, to drive right in with the trucks.

The Court: Well, why can't he testify about that now?

Mr. Powers: He is not asking about the modification, and the modification was he could do that provided he be charged with the crane engineer's wages, a proportionate charge, and that charge is what we say was made.

The Court: Well, I think you can inquire as to the modifications, Mr. Sims, of the contract, and what he was required to do under the modification.

Q. (By Mr. Sims): Under the modification, under the change, what were the drivers, particularly Dean Hutchens, required to do with relation to the delivery of these logs?

A. Well, I never instructed them to do anything.

Q. Talk louder, please.

A. I say I never instructed them to do anything.

Q. How did he know where to go with the logs?

(Testimony of William R. Francis.)

A. I instructed him to take them there, yes.

Q. And what is the practice after they arrived at Johnson's dock? A. Dump the logs.

Q. What does the driver do there?

A. He helped to dump them.

Q. In what way did he go about helping? What did he do—[54] anything with reference to the sling line?

A. He would loosen his chains and put the sling line on.

Q. Were all of your drivers, regardless of how they were paid, required to do the same work?

A. Yes.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Well, Dean Hutchens, was he an employee of yours? A. No.

Q. What was he?

A. He was a contractor.

Q. He was a contract hauler. Is that right?

Mr. Sims: That is objected to, and I move the answer be stricken. It is not proper cross-examination, and it is calling for a conclusion and legal opinion of this witness. This witness is not qualified to pass upon this matter.

The Court: Objection sustained, and the jury will be instructed to disregard the answer.

Q. (By Mr. Powers): Counsel asked you what

(Testimony of William R. Francis.)

Dean Hutchens would do down there when he took the load down, and you said you didn't tell him to do anything. Will you state why it is that you didn't give him any specific instructions?

A. Well, the operations at a dump are more or less the same regardless of where you haul. [55]

Q. Well, now, in your contract you were paid a certain amount per thousand, were you not, Mr. Francis?

Mr. Sims: If the Court please, that is not proper cross-examination and doesn't make any difference here as to what his payment was from C. D. Johnson Lumber Company, as far as this written contract is concerned. If he has a right to go into it at all, he would have to offer the contract, itself.

The Court: Objection sustained.

Mr. Powers: Well, they make the contention as to who was in charge or who had the obligation of doing this unloading, and it is directed at that point, your Honor.

The Court: Do you want to make this man your own witness?

Mr. Powers: No.

The Court: This isn't proper cross-examination, Mr. Powers.

Mr. Powers: I see.

Q. As I understand, the deceased furnished his own truck. You said he was a contract hauler. Did you have anything to do with this equipment, his binder chain, or bunk blocks, or so on, or was that up to him?           A. That was up to him.



(Testimony of William R. Francis.)

Q. In other words, you told him where to deliver the logs and that is all you were interested in, that he deliver them and then you paid him so much a thousand? A. Yes.

Mr. Babcock: Just a moment. We object to that as argument [56] and calling for a conclusion and immaterial.

Mr. Powers: Everything they went into.

The Court: They didn't go into that question. The objection will be sustained and the jury instructed to disregard it, and also we will strike the statement that he was a contract hauler.

Q. (By Mr. Powers): Were you asked the question as to how you paid Dean Hutchens by Mr. Sims?

Mr. Sims: I never asked him

A. No.

Q. (By Mr. Powers): Well, now with respect to the hauling, you had a contract, in any event, for these logs—you have testified to that—to haul the logs there. Mr. Sims asked you about that?

A. How is that?

Q. You had a contract with Johnson to haul logs, did you not? A. Yes.

Q. And you undertook in your contract, did you not, to comply with all the state rules and regulations with respect to delivery of these logs?

A. Yes.

Mr. Sims: If the Court please, that, again, is outside the scope of direct examination. If he wants

(Testimony of William R. Francis.)

to make him his own witness he might shorten this up.

The Court: You asked him if he had a contract and he said "Yes." I think that Mr. Powers can go into the terms of that [57] contract, but the question is that the contract is the best evidence of those terms.

Mr. Powers: Yes, I am sure that's right. That is all, Mr. Francis.

Wait a minute.

Q. You were asked, were you not, whether you carried him as an employee on your payroll?

Mr. Sims: I did not ask him that.

Mr. Powers: Oh, you didn't.

The Court: Did you drive a truck, yourself, Mr. Francis?

A. No, I am a logging contractor.

The Court: Were you on the C. D. Johnson dock from time to time?

A. Occasionally.

The Court: I think that is all.

### Redirect Examination

By Mr. Sims:

Q. Did you actually own some of these trucks, yourself?      A. I owned one truck.

Q. That was on this run?      A. Yes.

Q. And the same duties of the driver?

A. Yes.

Mr. Sims: Well, now, if the Court please, before we let Mr. Francis go, I want to be perfectly

(Testimony of William R. Francis.)

fair with Court and [58] counsel. I don't want to let him go if there is to be any issue on the matters that have heretofore been discussed. In other words, if counsel expects to go into that at a later time and use him as his witness, I want him to know—Mr. Francis is, as he said, from out at Sheridan, about 55 miles away, and if there is any question I want him to be advised now.

The Court: Have you any objections now to Mr. Francis' being excused?

Mr. Powers: Well, it depends on how your Honor rules a little later. He has gone into these things. I was going to ask the reporter to transcribe it. I wasn't going into it now. If the Court rules one way, there is no need for him to stay. There is no need for me to have him stay. It is their contention.

The Court: Well, as far as I am concerned, he can go. If you want to hold him here, Mr. Powers, that is perfectly all right with the Court. As far as you are concerned he can leave?

Mr. Powers: Yes. The Court has stopped me from pursuing my question. The time has not arrived for me to call any witnesses.

The Court: Have you subpoenaed this witness?

Mr. Powers: I have not.

The Court: Do you want to subpoena him for yourself?

Mr. Powers: No.

The Court: You are excused. [59]

Mr. Powers: He is a third-party defendant, but he isn't connected with this issue here.

The Court: You are excused, Mr. Francis.

(Witness excused.) [60]

Mr. Sims: Mr. Nickerson.

L. W. NICKERSON

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mr. Nickerson, you live up above Sheridan, I believe. Is that right?

A. Yes, above Sheridan.

Q. You have a farm at Gopher Valley?

A. Red Prairie.

Q. Oh, Red Prairie. And at the time of this accident, I believe you were working for Mr. Francis?

A. I was.

Q. Head loader. Is that right? A. Right.

Q. Do you remember the particular load that Dean Hutchens took the morning of the fatal accident? A. How is that?

Q. Do you remember the load that he took, what kind of a load it was? A. Yes.

Q. What was the load? A. A one-log load.

Q. And do you remember how the binder chain was fastened at the [61] truck or trailer?

A. No, I don't remember just how it was. It was on the trailer, is where it was at; wasn't on the truck.

(Testimony of L. W. Nickerson.)

Q. And how was the binder chain put on at the trailer?

Mr. Powers: Well, now, he knows there was a binder chain on this load, and doesn't know how it was put on in some other case.

The Court: Sustained.

Q. (By Mr. Sims): I am asking about this particular log.

A. Well, I think that was on the bunk, on the trailer, thrown over and bound on one side. I don't know just which side the binder was on.

Q. Was there any on the truck?

Mr. Powers: We will object to that. We are concerned with when that log was delivered, not out in the woods, the condition of it at that time and not then.

The Court: You may ask your question, but I think Mr. Nickerson stated he didn't know whether the binder chain was on the log or not?

A. No; I said the binder was on the log, but I didn't know which side.

The Court: Oh, I beg your pardon.

Q. (By Mr. Sims): It was, as I understand, on the trailer. Is that right?

A. It was on the trailer. [62]

Q. Was that binder chain fastened on both sides of the trailer, do you know?

Mr. Powers: This is leading.

Q. (By Mr. Sims): Do you know?

A. Well, it was fastened on one side and thrown

(Testimony of L. W. Nickerson.)

over and bound on the other. I don't know whether it goes under the bunk or how it goes.

Q. How well did you know Dean Hutchens?

A. I knew him pretty well.

Q. Do you know what his habits of life were?

A. How?

Q. Do you know personally his habits of life, whether he was industrious, frugal, and a good driver?

A. He seemed to be, what I knew of him, a pretty good kid.

Q. About how old was he?

A. I couldn't tell you that.

Mr. Sims: You don't know his age.

You may cross-examine.

#### Cross-Examination

By Mr. Powers:

Q. You say when you saw the chain, as far as you know it was tied on one side?

A. And brought under the bunk.

Q. And brought around. Now, was it, if you know, fixed so that it could be unfastened without going between the brow log? [63]

A. I couldn't tell you. I don't know which side it was bound on.

Q. Are you head loader out there?

A. Yes.

Q. Are you familiar with the code requirement that requires that any binder chain or any bunk be

(Testimony of L. W. Nickerson.)

fixed so that it can be unfastened without going between the truck and brow log?

A. I couldn't say.

Q. As head loader, you don't know whether there is such a requirement. Did you, or was it the deceased, that did the arrangement of the chains? Who was that up to—you or him?

A. How was that?

Q. Was it the deceased, Dean Hutchens, that put the chain in place, or was it you?

A. He put it there in place.

Q. He put it there in place, himself?

A. I guess.

Mr. Powers: That is all.

The Court: That is all, Mr. Nickerson.

(Witness excused.) [64]

Mr. Sims: And there is another Mr. Nickerson.

### EDWARD H. NICKERSON

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Nickerson, was that your father that just left the stand? A. Yes.

Q. And do you live at home? A. Yes.

Q. How old, about, are you now?

A. Twenty-three.

(Testimony of Edward H. Nickerson.)

Q. Twenty-three. Did you know Dean Hutchens pretty well?      A. Just as a working partner.

Q. Beg pardon?

A. Just as a working partner.

Q. Working partner. Did you see this one-log load?      A. Yes.

Q. And do you remember how it was loaded, how it was tied on?

A. I wouldn't swear to anything on that.

Q. Would you raise your voice, please? We have competition out here in the street.

A. I have competition in my throat, too.

Q. Now, will you answer that? [65]

A. I wouldn't swear as to how that was tied.

Mr. Powers: He wouldn't swear as to how it was tied.

Q. (By Mr. Sims): You are not sure how it was tied?      A. No.

Q. Were you there the morning he left with the load?      A. Yes.

Q. Were you down at the dock of Johnson Lumber Company?

A. Never have been in there that I remember.

Q. What were your general duties there at the Rouleigh Francis landing?

A. Choker setting and load that log.

Q. Did you help on this particular log?

A. Yes.

Q. You and your father?

A. No; just myself and my brother.

Q. Oh, you and your brother loaded it?



(Testimony of Edward H. Nickerson.)

A. Yes.

Q. And Dean drove the truck in and drove it out?

A. Yes.

Q. Do you remember the dimensions of the log?

A. Well, the county says nothing over 40 feet long, and we always try to give them at least 5,000 feet.

Q. Well, is the dimension at the——

A. A 5,000-foot log has 51 inches.

Q. Large end? [66] A. Small end.

Q. The small end is 51 inches and the large is what?

A. We never measure that.

Q. What was the length?

A. Well, the county law says 40 feet.

Q. What length do you say?

A. The county law says 40 feet.

Q. 40 feet? A. Yes.

Q. And 51 inches at the small end?

A. I wouldn't say how big it was, but we always try to give them 5,000 feet and 51 inches; 5,000 feet.

Q. Wasn't there a chain on the log when he left?

A. I don't remember, but he usually always put a chain on before he moved his truck.

Q. When there is a one-log load, what is the custom as to tying on at the trailer?

A. There is usually two ways.

Mr. Powers: We will object to any custom. He doesn't know how this was, and this was in issue.

The Court: Objection sustained.

Mr. Sims: Very well.

You may cross-examine. [67]

(Testimony of Edward H. Nickerson.)

### Cross-Examination

By Mr. Powers:

Q. It is up to the truck driver to put his binder chain on, is it? A. Yes.

Q. And the truck driver does it? A. Yes.

Mr. Powers: That is all.

The Court: That is all.

(Witness excused.)

Mr. Sims: Call Mrs. Hutchens.

The Court: Have you any witnesses that have to leave this evening?

Mr. Sims: Well, these employees are all anxious to leave, but if this one problem is resolved as I have it in mind I feel we can determine that and then perhaps let them all go.

The Court: You mean you won't call them?

Mr. Sims: If the ruling is as I anticipate. Now, there is a truck driver, here, and if there is any question about that, I, of course, would put him on, put him on yet this evening.

The Court: I have told you I am not going to tell you what evidence to put on. You have to make up your own mind.

Mr. Sims: Well, my associate suggests this: that perhaps [68] if we had a recess counsel can agree and stipulate as to these other facts, and if that is done, of course, that will relieve us from calling quite a number of witnesses, and save time in that regard.

The Court: All right. The jury will be excused for a period of about five minutes, during which time we will take this matter up.

(Thereupon the jury was excused for a recess, and the following occurred without the presence of the jury:)

The Court: Do you want to talk to Mr. Powers in a recess?

Mr. Powers: I just think it will take us a minute. I hope so. I will either tell him whether we will stipulate or not just as soon as he tells me what it is.

(Thereupon counsel conferred together in an undertone.)

Mr. Powers: Let's see if I can state it: that the truck drivers of Francis—just say "the decedent"—had a right under the contract to be on the premises in delivering the logs, and that the decedent, as well as other drivers, had certain duties in connection with the unloading of the logs.

Is that it?

Mr. Babcock: Yes.

Mr. Sims: Which included, if I may add—which included [69] stopping their truck according to the signal.

Mr. Powers: No, I won't stipulate to that. You have the testimony on that.

Mr. Babcock: In connection with the employees of C. D. Johnson Lumber Corporation.

Mr. Powers: I will stipulate just what I have stated here. You have already got from the wit-

nesses what they did, that he blew the whistle to stop him, and you have got all that.

The Court: I think you have. Mr. Vincent and Mr. Neal testified—particularly Mr. Vincent—as to what they were supposed to do.

Mr. Babcock: Yes. The point is, your Honor, we are trying to get a stipulation on agreed facts to make it possible for a ruling on this other question. Now, it is true that there is certain testimony there, but it is always possible that Mr. Powers might, at a later date, rebut that or offer contradictory testimony.

Mr. Powers: Well, I am willing to stipulate now that he had a contractual right to come on the premises and deliver those logs. I think that is the point you want.

Mr. Sims: That's right.

Mr. Powers: We will so stipulate.

Mr. Babcock: And he had to perform these duties in connection with the C. D. Johnson Lumber Corporation.

Mr. Powers: No; I take the position with the C. D. Johnson [70] Lumber Company that the C. D. Johnson is remote; that the truck driver has the responsibility. I set it forth, and that is our contention, and that is that a contractor, or independent contractor—if Francis is the contractor—they have to get those logs in the water. There wasn't any intermingling in the sense you have here, because the log hauler has a perfectly safe place. At this particular place he was some thirty or forty feet from the crane operator, and everything that was

done on that log, releasing the whole business, was done by the decedent, not by C. D. Johnson.

The Court: What do you want to do?

Mr. Babcock: As far as that is concerned, that can be developed, that the truck driver and the crane operator performed certain duties, to unload the log. As to who was in charge and who wasn't, that is something we can——

Mr. Powers: You have already got evidence. I will stipulate they had a contractual right to come on there, and that is what you want.

Mr. Babcock: And they performed certain functions.

Mr. Powers: And in connection with that, he had certain duties to perform.

The Court: Is that sufficient?

Mr. Babcock: I think that is sufficient.

Mr. Sims: We will put on another witness—  
Mrs. Hutchens. I think we will put her on. [71]

The Court: Call the jury back.

(Thereupon the jury returned to the jury box, and the following occurred within the presence of the jury:)

Mr. Sims: Call Mrs. Hutchens.

Mr. Powers: Do you want the stipulation to go before the jury now?

The Court: It is immaterial to me.

Mr. Powers: It doesn't make any difference to me.

Mr. Sims: Would the court reporter read it?

(Stipulation read.)

Mr. Powers: On the premises of the C. D. Johnson Lumber Company.

The Court: I don't know whether the jury understands that, but it has been stipulated as an admitted fact that Dean Hutchens and the other drivers of W. R. Francis had a right to go on the premises of the C. D. Johnson Lumber Corporation—that is, the dock—and that in connection therewith they had certain duties to perform.

### KATHLEEN HUTCHENS

the plaintiff herein, was thereupon produced as a witness in her own behalf, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. You are Kathleen Hutchens, I believe? [72]

A. Yes.

Q. And you are the lady that this lawsuit is really about? A. Yes.

Q. And Dean Hutchens was your husband. Is that correct? A. Yes.

Q. How old are you now?

A. Twenty-four.

Q. And when was your birthday?

A. May the 28th.

Q. Of what year? A. 1926.

Q. And I believe you have no children?

A. That's right.

Q. How long did you know Dean before you were married? A. Three years.

(Testimony of Kathleen Hutchens.)

Q. Were you in high school together?

A. Yes.

Q. What high school?

A. Dayton High School, Dayton, Washington.

Q. And when did you and Dean get married?

A. November 30th, 1947.

Q. And he was about how old then, Mrs. Hutchens?

A. He was nineteen.

Q. He was nineteen when you married him. And, as I understand it, you folks were living—your home was in McMinnville? [73]

A. That's right.

Q. And was he the purchaser of a logging truck?

A. Yes.

Mr. Powers: That is all admitted.

Q. (By Mr. Sims): And, in a general way, Kathleen, would you tell approximately what his earnings were a month, approximately?

A. Well, I really can't say to that. Do you mean when he was driving truck, his net income?

Q. That's right.

A. Well, fifteen or eighteen hundred dollars a month, something like that. That was the net income.

Q. You mean net, or gross?

A. Well, gross, it is.

Q. And the net income would be—would you say approximately \$300 a month?

A. Yes, I would say so.

Q. And do you know about how much he earned during 1949 between January and August?

(Testimony of Kathleen Hutchens.)

A. Between January and August?

Q. That's right. A. No, I don't.

Mr. Sims: And I am sure that the income tax records are here, and I think counsel has seen them.

The Court: Why don't you stipulate instead of asking this witness, who doesn't seem to know? [74]

Mr. Sims: Well, maybe we will do that and offer in evidence at this time, then, the income tax records. Counsel, I believe, has seen them.

The Court: Any objection?

Mr. Powers: No, I have no objection, your Honor. Put them in.

The Court: Well, they may be marked and introduced.

(The U. S. Individual Income Tax Returns for H. D. and Kathleen Hutchens, for 1948 and 1949, so offered, were thereupon admitted in evidence and marked as follows: 1948 income tax return as Plaintiff's Exhibit 19; and 1949 income tax return as Plaintiff's Exhibit 20.)

Mr. Sims: And may we pass the reading at this time, your Honor?

The Court: That is perfectly all right.

Q. (By Mr. Sims): Kathleen, will you tell us a little bit about Dean's habits of life, as to industry and frugality?

A. Well, he was a very good worker, saved his money. He was a very good person, and he was very well liked. He had no bad habits. He didn't drink or smoke.



(Testimony of Kathleen Hutchens.)

Q. Did you folks graduate from Dayton High School?      A. That's right.

Q. That was back in when? [75]

A. I graduated in 1945 and he in 1946.

Q. What would you say he did with his money in a general way?

A. Well, he made his car and truck payments.

Q. Do you know how much the truck payments were?

A. He bought the truck in July of 1948. His truck payments were \$315 until April of '49, and he had his truck made into a six-wheeler, and then the truck payments were \$400 a month.

Q. And did he make the payments?

A. Yes.

Q. Was he buying a car? Did you have a family car he was buying?

A. When we were married he had a '46 Chev, and he traded it in on a '48 Hudson, and he was finishing paying for it.

Q. Well, did he spend his money personally on himself, or did he provide well as far as his wife was concerned?

A. He provided very well, yes. I never wanted for anything.

Q. Did he have any special training in the mechanical field or that sort of thing?

A. He was a very good mechanic, and he was——

Q. And what, perhaps, particularly did you have planned for the future, the two of you?

(Testimony of Kathleen Hutchens.)

A. We planned on going back to Dayton and buying a farm.

Q. You were going to have a home on a farm at Dayton, Washington? A. Yes, that's right.

Q. What, Kathleen, in a general way, was his health? [76] A. He had perfect health.

Mr. Sims: I think you may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Mrs. Hutchens, just a question or two. Let's see. I think that you said Dean graduated about '46, was it? A. That's right.

Q. And you graduated the year before?

A. That's right.

Q. Was that Dayton, Washington?

A. That's right.

Q. And where is your residence now? Where do you live now?

A. Well, I have no permanent address. I am staying with my sister-in-law at Dayton, Washington.

Q. Up at Dayton, Washington?

A. That's right.

Q. And now when you got through high school, did you start to work, yourself?

A. No; I stayed at home most of the time.

Q. You stayed at home most of the time?

A. That's right.

(Testimony of Kathleen Hutchens.)

Q. And then when was it that you started to work?

A. Well, I don't really recall. I didn't work very much. I stayed at home because of ill health and my grandmother.

Q. Well, you did take some position, I think you said in your [77] deposition, if I remember correctly. Weren't you working in a restaurant somewhere?

A. I worked in an ice cream parlor for awhile.

Q. Up in Dayton? A. That's right.

Q. And then have you been working lately?

A. Yes, I have.

Q. And where do you work now, please?

A. I work in the Blue Mountain Cannery at Dayton.

Q. The what?

A. The Blue Mountain Cannery in Dayton.

Q. I see. And when you lived in Oregon, where did you live here? Was it is McMinnville?

A. That's right.

Q. Did you have a house there, or——

A. We had a house.

Q. There have been no children born?

A. That's right.

Mr. Powers: I think that is all.

Mr. Sims: One thing I should have asked on direct, and that is with reference to funeral expenses, your Honor. May I?

Mr. Powers: We will stipulate whatever you have in there.

(Testimony of Kathleen Hutchens.)

The Court: Is there any disagreement?

Mr. Powers: No.

Mr. Sims: Thank you very much.

I think that is all.

(Witness excused.) [78]

Mr. Sims: Mr. Hutchens.

### DORSEY HUTCHENS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. You are Dorsey Hutchens? A. Yes.

Q. How do you spell your given name?

A. D-o-r-s-e-y.

Q. And are you a brother-in-law of Kathleen's?

A. Yes.

Q. And then Dean, of course, was your own brother? A. Yes.

Q. And how many in your family, Dorsey?

A. Four children.

Q. Four. And how many were boys and what did it consist of? A. Three boys and one girl.

Q. And the girl, what is her name?

A. Mrs. Barr.

Q. Is she the oldest? A. Yes.

Q. And where was Dean in this—was he the youngest or second?

(Testimony of Dorsey Hutchens.)

A. He was the youngest, yes.

Q. Your sister was the oldest, and then you were next? [79]

A. No, my other brother is next.

Q. That is Lee? A. Lee.

Q. And then you, and Dean was the baby?

A. That's right.

Q. And did you see Dean quite frequently during the last few years of his life, high school days? Did you see him often?

A. Not too much until the last two or three years, possibly after he got out of high school.

Q. And what would you say as to your brother's habits of life, Mr. Hutchens?

A. Well, I thought he was very careful in his work. He was very determined to accomplish what he started after.

Q. What would you say as to his habits with relation to money?

A. I think he took care of it as wisely as he could.

Q. How did he get along with his wife and treat her with reference to money matters, if you know?

A. I think she always had what money she wanted.

Q. And did they drive and have a family car?

A. Yes.

Q. And do you know about the logging truck that he was buying? A. Yes.

Q. Do you know what the name of the truck was? A. International.

(Testimony of Dorsey Hutchens.)

Q. And the usual logging truck, I understand? [80] A. Yes.

Q. What would you say as to Dean's habits as to sobriety? Did he drink or smoke?

A. Not that I ever knew. I think I would have known it.

Mr. Sims: You may cross-examine.

Mr. Powers: No questions. Thank you.

The Court: That is all, Mr. Hutchens.

Mr. Sims: Your Honor, there is another line of questions I want to go into with this witness dealing with the industry, itself, but I thought the time wouldn't justify it in view of the closeness of time.

The Court: How many more witnesses have you?

Mr. Sims: I think just three or four.

The Court: Are they long or short?

Mr. Sims: I don't think any of them will be very long. I expect we will be through during the morning.

The Court: During the morning?

Mr. Sims: Yes. I am going to suggest to counsel when we do adjourn that if he has witnesses to put on he should have them here tomorrow morning because I don't expect us to take all day tomorrow. I think we will be through before the noon adjournment.

The Court: How about you, Mr. Powers?

Mr. Powers: I am going on the basis that we are going to finish tomorrow, so we will get through tomorrow one way or [81] another.

(Testimony of Dorsey Hutchens.)

The Court: What does that mean—5:00 o'clock?

Mr. Powers: As I recall it, you said we would keep on going until 12:00.

The Court: Well, I am not going to.

Mr. Powers: Well, if counsel finishes mid-morning, I should think we would be through certainly by 5:00 o'clock tomorrow. I will do everything I can to expedite it, and probably get it to the jury tomorrow afternoon.

The Court: In view of that fact, we won't instruct them until Thursday morning, so that we won't have to run overtime unless you anticipate any long witnesses. We will see how it goes off tomorrow morning, and then we may start at 1:00 or 1:15 and keep going through.

Would you prefer putting on Mr. Hutchens tomorrow again?

Mr. Sims: Yes, I would, your Honor. I wanted to reserve that right. In other words, I thought I would take care of the family situation and get away from that, and then get right on into the merits.

Mr. Powers: If it wouldn't take long, couldn't we dispose of it now? We have five minutes.

Mr. Sims: We can't do it in five minutes.

The Court: All right.

You may step down, now.

(Witness temporarily excused.) [82]

The Court: Would you prefer coming back at 9:30 tomorrow, or 10:00 o'clock?

Mr. Powers: I hope they are going to say 10:00 o'clock. Now, your Honor, you want instructions out, and——

Mr. Sims: We agree on that.

Mr. Powers: ——by the time I get through here the stenographer is gone, and if we are going to write our instructions between 9:00 and 9:30, I probably wouldn't have them here.

Mr. Sims: That would let us go on a little happier note. Mr. Powers and I are in complete accord.

The Court: We will now adjourn until 10:00 o'clock tomorrow morning.

Now, let me announce again, don't discuss this with the other jurors or members of your family. You will have plenty of time to discuss it when it is submitted.

We will adjourn until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., tomorrow, Wednesday, June 21, 1950.) [83]

Wednesday, June 21, 1950

The trial was resumed, pursuant to adjournment, at 10:00 a.m., and the following further proceedings were had herein:

The Court: Mr. Sims.

Mr. Sims: Your Honor, I wanted to continue with the brother, Dorsey, but he isn't here yet, apparently has been detained, and I wonder if I might call another witness.



The Court: Yes.

Mr. Sims: Mrs. Barr, please.

NADINE BARR

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mrs. Barr, I guess you didn't know I would call you as a witness this morning. I am only going to ask a question or two. You are, I believe, the sister—I guess the only sister—that Lee and Dean and Dorsey have. Is that right? A. Yes, sir.

Q. In other words, the family consisted of four of you children? A. That's right.

Q. And you are about how old now, Mrs. Barr?

A. I am thirty-seven.

Q. You are thirty-seven. And Dean was the baby of the family [84] and twenty-one?

A. He was twenty-one when he was killed.

Q. And throughout his entire lifetime were you constantly in touch with him? A. Yes, I was.

Q. And what would you say as to his habits of life, his frugality, drinking and smoking, and what he did with his money?

A. He neither drank nor smoked nor gambled, and he worked hard from the time he was a very young boy, and saved his money and put it always to a good use.

Mr. Sims: You may cross-examine.

Mr. Powers: No questions. Thank you, Mrs. Barr.

Mr. Sims: Thank you, Mrs. Barr.

(Witness excused.) [85]

Mr. Sims: And Mr. Hutchens, please.

### GEORGE HUTCHENS

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Hutchens, what relationship do you have to Mrs. Barr and Lee and Dean and Dorsey?

A. I am their father.

Q. You are the father. And just a question or two, Mr. Hutchens. What would you say as to the kind of a boy Dean was with reference to his habits? Did he smoke and drink? Did he gamble?

A. No, sir; he didn't do none of those.

Q. And what would you say as to the way he handled his money?

A. He was very careful and conservative with his money.

Mr. Sims: I think that is all.

Mr. Powers: No questions.

Mr. Sims: Thank you.

(Witness excused.) [86]

Mr. Sims: Mr. Peoples.

RALPH W. PEOPLES

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sims:

Q. Mr. Peoples, whereabouts do you live?

A. I live at Yelm, Washington.

Q. Where is that?

A. That is in Thurston County about 33 miles south of Tacoma.

Q. And how old are you?

A. Approximately forty-five.

Q. And what is your particular training and background, Mr. Peoples? What type of work have you done for the last—well, let's say thirty years?

A. I have been a workman in the lumber industry since 1919, principally.

Q. And when you say "the lumber industry," what type of work do you include?

A. Well, that includes logging and sawmill work. My work has been principally in the logging end of it.

Q. Now, in the logging end of it what have you done? What jobs and positions have you held?

A. Well, I started out in the days of the steam donkeys, and for awhile I split wood and fired donkeys and worked as a signal [87] man and powder man and choker setter, rigger.

Q. Now, you are getting ahead of us a little bit.

(Testimony of Ralph W. Peoples.)

Let us go back. What is a steam donkey man? What do you mean by that?

A. Well, the work, the yarding of logs, was accomplished with donkeys that were powered by steam engines, and my work was to supply fuel and fire the boilers to generate steam for the operation of these engines.

Q. Now, you said "signal man." What is a signal man?

A. Well, he is a man who takes a position in the woods in the vicinity of the rigging crew and transmits their signals by means—in those days a jerk wire.

Q. Anything like a whistle punk?

A. Well, it is all the same.

Q. And then you mentioned choker setter. What is a choker setter?

A. Well, these logs are moved from the woods by lines, and the short piece of a line that is used to attach the log to the butt rigging is called the choker, and the choker setters are those men in the woods who place that line in position around the logs so that they may be dragged into the landings.

Q. You used the word "yarding." What do you mean by that?

A. Well, the term "yarding" refers to the movement of logs from where they lie at the trees which have been felled and bucked into logs to their first point of rest. In some cases it is along a roadway or in others it is a spar tree some [88] distance from a roadway, and they have to be moved again

(Testimony of Ralph W. Peoples.)

by other machines to a place where they can be loaded upon cars or trucks.

Q. When you say "spar tree," what does that mean? What do you refer to there?

A. Well, a spar tree is a tree that is either standing in its natural position or has been moved or raised from another place in which the blocks are hung that the line renders through to bring the logs from the woods.

Q. All right. Now, you go ahead with your next. I stopped you when you said that you had done some choker setting. What else is there?

A. Well, I worked as a powder man.

Q. All right. Now, what is a powder man?

A. Well, in the operations where I worked at the powder man's job was to principally to see that there were holes under the logs at the appropriate places for the rigging men to set the chokers. If there wasn't a natural opening there it was my business to set a charge of dynamite and blow a hole there big enough for them to put the line through, and in addition to that, why if there were stumps that were in the way that had to be removed or dirt that had to be moved, it was my responsibility to place the charges and set them off.

Q. All right. Now, what else did you do in the woods logging?

A. Well, I have done some rigging. [89]

Q. All right. Now, as a rigger, what is that?

A. Well, the rigging, as I refer to it, consists of helping to put the rigging up in the spar trees,

(Testimony of Ralph W. Peoples.)

move the donkeys into their setting and get the lines strung and in proper position to start logging, and some of that rigging work has been in connection with slack line and skidder operations, which is a yarding operation of a little different type, where it is necessary to rig trees at the backside of the yarding show, and I have worked at that, and that is included.

Q. Have you had anything to do with the trucking end of the logging industry?

A. Yes, I have, a little.

Q. Well, what other things have you had to do now with the logging industry? Does that about cover it?

A. Well, in recent years I transferred from the rigging end of it to the cutting crews, and I worked for a number of years in the falling and bucking and scaling of logs.

Q. Now following and bucking includes what work?

A. Well, that includes taking tools into the woods to where these trees are standing and falling the trees to the ground and cutting them into log lengths.

Q. All right. Now, what else have you done?

A. Well, that covers pretty well, except for a short while I worked as a truck driver. It covers pretty well the experience I have had as an actual employee of logging companies, although [90] in recent years I have worked with the logging industry rather than actually for it.

Q. And are you familiar with the dock and the

(Testimony of Ralph W. Peoples.)

facilities of the C. D. Johnson Lumber Company at Toledo?      A. Yes, in a general way.

Q. What was your first introduction to that?

A. In 1924 as a construction hand for the Wardmeyer Construction Company I worked in the construction of their dock facilities there.

Q. Are those the dock facilities that are still in use and include the unloading dock?

A. I believe so.

Mr. Sims: If the bailiff would kindly hand the witness the photographs in evidence, with the exception of the photograph of Dean Hutchens.

Q. I will ask, Mr. Peoples, if you recognize any of those pictures as pictures of the dock and facilities where you worked, the facilities you helped construct in 1924.

A. Well, Exhibit No. 3 is not recognizable by me. It could be 'most anywhere. Exhibit No. 4 appears to be looking from the landward end out towards the south.

Mr. Powers: I don't know what counsel is trying to prove, but I can probably stipulate if he has some point in mind.

Mr. Sims: Well, the point is to identify merely——

Q. Is this the dock, now that you have scanned some of the [91] photographs? Is this the dock on which you worked back in 1924?      A. Yes, sir.

Q. Now, have you had any special interest or special work with reference to safety matters in connection with the industry?      A. Yes, sir.

(Testimony of Ralph W. Peoples.)

Q. And what has that consisted of?

A. I was employed for three years by the Oregon Industrial Accident Commission in their Safety Division, and I am presently employed and have been for two years by the Department of Labor and Industries of the State of Washington in their Safety Division.

Q. Now, what do those duties—in other words, the last five years of your life have been devoted to work for the State of Washington and the State of Oregon in the Division of Safety—is that correct—with reference to this industry?

A. Well, there was a break in my employment in between my employment by the State of Oregon and the State of Washington of a couple of years, sir.

Q. But you have altogether put in this much time in the safety field? A. Yes, sir.

Q. Now, the Department of Labor and Industries of the State of Washington, is that similar in a general way to what we in Oregon call the State Industrial Accident Commission?

A. Yes, it handles the same functions that the Oregon Industrial [92] Accident Commission does, with some additional responsibilities.

Q. Now, what are your duties in a general way where you are now employed by the State of Washington?

A. I am a safety inspector in logging camps.

Q. Well, now, what do those duties include?

A. Well, it is my duty to make physical exami-



(Testimony of Ralph W. Peoples.)

nations of the premises and machines and rigging that are used in logging, and to observe the operation for unsafe practices, and it is my job to call attention of management and workmen, as well, to any unsafe conditions or unsafe practices that I find and ask that they be corrected.

Q. Do you give any particular attention to log unloading dumps?           A. Yes, sir.

Q. Now, in this particular case, Mr. Peoples, knowing this dock as you do at Toledo, what would you say would be the safe and proper practice in the matter of handling unloading of logs where a dump is handling the unloading and the unloading engineer tells you that about 80 loads a day, that that would be a good, big workday for them? He didn't say how low it would go, but I assume some less. I don't know if it is a half less, but if you unload about 80 loads, now, what would be the safe practice with reference to having a safety man to observe that all men were in the clear before there was an unloading?

Mr. Powers: I would like to ask the witness a question [93] before he answers, your Honor.

Mr. Sims: No objection.

Mr. Powers: How long since you have seen the dock at Johnson's, Mr. Peoples?

A. The last time that I made a close—anywhere near close observation of that dock, sir, was about ten years ago. I have seen it from a distance more recently.

Mr. Powers: You actually haven't observed it

(Testimony of Ralph W. Peoples.)

closely for a period of ten years?      A. No, sir.

Mr. Powers: And the particular dock or brow log, this No. 3 log that we are talking about, you don't know anything about that, do you?

A. No, I wouldn't.

Mr. Powers: I don't think the witness should be allowed to say. I don't think that the number of trucks involved has any bearing. There was only one truck here at the time to be unloaded, and the number that comes in—his crane can only unload one truck at a time, so I don't think——

The Court: I don't think he has asked sufficient facts to give a sufficient description of the unloading dock and facilities there.

Mr. Sims: Very well. Will you return the pictures, Mr. Bailiff?

Mr. Powers: I might state that this dock was only built [94] two years ago.

Mr. Sims: Well, the pictures——

Q. I will ask you to go ahead and review all of the pictures, having in mind the question I am asking is with reference to that particular dock, and we can narrow it down to just the unloading of, as counsel says, one truck at a time, as to whether it is a proper and a safe practice to have a safety man on the dock with no other duties than to see all men are in the clear and that the operation is conducted safely.

Mr. Powers: I don't think that calls for expert testimony. It is for the jury, I submit, to conclude. The jury has heard all the facts.

(Testimony of Ralph W. Peoples.)

Mr. Sims: That is a subject of——

Mr. Powers: Not the subject for an expert.

Mr. Sims: The Company's foremen have already testified that it wouldn't be practical, that they wouldn't want a safety man there. I think we have a duty to the jury to explore that so they will know what is a safe practice. A man with 30 years' experience and five years as an employee of the states of Washington and Oregon, with particular training in that field, I think would be very helpful to a jury, and he certainly has special knowledge of this particular dock, and I feel I have a duty to the jury to explore it.

Mr. Powers: Where is there any charge of failure of a safety man to be on the dock? [95]

Mr. Sims: It is there in Paragraph 3, I think, of the contentions.

Mr. Powers: Just give me the number, and I will find it.

Mr. Sims: I haven't the pre-trial order. Page 8, I believe, covers it.

Mr. Powers: That doesn't call for any safety engineer.

Mr. Sims: Insufficient workmen is something we charge.

Mr. Powers: This is opening up new issues, your Honor.

Mr. Sims: Oh, no.

The Court: Look at Subdivision 7.

Mr. Powers: Well, that still is a new issue, nothing about any safety engineer that I can see in there.

(Testimony of Ralph W. Peoples.)

The Court: I will sustain the objection on that ground.

Q. (By Mr. Sims): What would be the safe and proper practice of having another workman on the dock for the purpose of seeing that all men are in the clear, one man only to give signals as to the unloading?

Mr. Powers: We will object to that. That is for the jury to conclude, your Honor.

The Court: Objection overruled.

The Witness: Will you read the question to me, please

(Last question read.)

A. Such a procedure would be a safe and practical means of operating.

Q. (By Mr. Sims): What would you say as to the safe and proper [96] practice of the use of a blast of a whistle, some loud, audible signal, to indicate that the unloading was about to take place? Would that be a safe and proper practice, in your opinion?

Mr. Powers: Same objection, your Honor; doesn't call for any expert.

The Court: You may answer the question, Mr. Peoples.

A. Such a means would be practicable and assist in the safety of the operation.

Q. (By Mr. Sims): The evidence here is that the unloading engineer was the man whose duty it was to see that the men were in the clear. Now, my question, Mr. Peoples, is that after a signal

(Testimony of Ralph W. Peoples.)

has been given and there is an interval during which time another workman walks at least 20 feet and then gives a signal, what is the safe and proper practice as to whether the unloading engineer should again observe the first workman and again get his signal from him or see where he is?

Mr. Powers: Same objection. It invades the province of the jury.

The Court: Objection sustained.

Q. (By Mr. Sims): If there is an interruption between the signals, what is a safe and proper practice as to the unloading?

Mr. Powers: Same objection.

The Court: Objection overruled.

Mr. Powers: It isn't a proper hypothetical question. What is an interruption? The witness testified it was a matter [97] of seconds. Now, this clearly, in my opinion, invades the province of the jury. The jury heard the witnesses, and they are in just as good a position as anybody else to hear.

The Court: In order to meet Mr. Powers' objection, will you state additional facts?

Mr. Sims: There is no evidence as to seconds. The only additional facts that I know of to give the witness are these: that he says a signal was given by a truck driver, and that he observed a man who was on some planks near the unloading crane, and he sent him a distance of about 14 feet over to the face of the dock to look down on the water and see if the men were in the clear on the water. The man walked back—he doesn't know, but he

(Testimony of Ralph W. Peoples.)

estimated about six or eight feet—until he was about the center of the dock, about the center of the truck, and at that time gave a signal. Now, my question is, what would be the safe and proper practice as to observing, giving attention to, the first workman?

The Court: I think on that I am going to sustain the objection, because that is precisely one of the questions that the jury is going to have to answer.

Q. (By Mr. Sims): Is it a safe and proper practice for an unloading engineer to unload without observing where workmen are that might be affected by the unloading?

Mr. Powers: The same objection, your Honor.

The Court: I think this is a little different. Objection [98] overruled.

The Witness: Will you read the question, please?

(Last question read.)

Mr. Powers: The hypothetical case must be given to any expert. The jury has heard the testimony here, and it is up to the jury. The jury heard the witness testify that it was a matter of seconds, that the driver did give the signal to unload, and he asked the other fellow by signal to look in the water, and he looked, and he said it was a matter of seconds that he went ahead.

The Court: I think he is merely testifying as to good practice in the logging and mill operations, not as to this particular accident.

(Testimony of Ralph W. Peoples.)

Mr. Powers: I don't see where the good practice enters into it. They are not charging any violation of good practice. They are charging violation of the Employers' Liability Act, which relates to devices and appliances.

Mr. Sims: They are charged here with the use of every care and device and prescription practical without impairing the efficiency of the work, regardless of expense, to all persons and generally the public, as might be affected by this thing involving a risk or danger, and I do feel that it is our duty to develop that particular fact as to whether generally the unloading engineer should observe those in an immediate area and know where they are before he unloads. [99]

Mr. Powers: That is the fallacy of it. In my opinion, the act doesn't apply to a human failure. It applies to some mechanical or apparatus defect, and what he is going into is the conduct, actually the conduct, of the crane engineer. There is no statute that can charge or require any employer to try to furnish a better engineer than somebody else. The statute is designed to furnish safe equipment and appliances.

Mr. Sims: It applies to the human being.

Mr. Powers: It doesn't apply to the human mind.

Mr. Sims: It certainly does.

The Court: The question is, as I understand it, whether the loading engineer should be in position

(Testimony of Ralph W. Peoples.)

to see men who might be affected by the unloading of logs.

Mr. Sims: That is what I mean, exactly.

The Court: You may answer the question.

Mr. Powers: And may I have an exception.

A. Yes, he should be.

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Let's see. Were you in Oregon when the Safety Logging Code was enacted, Mr. Peoples?

A. Yes, sir.

Q. When was that?

A. 1943—1944, I believe, it actually went into effect. [100]

Q. Actually October 25, 1944, was it not?

A. Yes, sir.

Q. Then you were here how long after that?

A. Well, I lived here in Oregon until May of 1948.

Q. Working as inspector, I mean.

A. Well, I was with them until early in 1946.

Q. Yes. Now, that operation, the Safety Logging Code, that applies to dumping logs such as we are talking about here, doesn't it? A. Yes, sir.

Q. And there is no requirement in there about any whistle before you make your unload, is there?

A. No, it doesn't require it.

Q. No, sir. Now, as a matter of fact, taking these things one by one, is it not a safer operation to



(Testimony of Ralph W. Peoples.)

make a visual inspection and see whether a man is safe and in the clear rather than blow a whistle and go ahead and dump?      A. Yes, I think it is.

Q. For instance, a pond man might be down below and you blow a whistle and he might not have a chance to get out of there before you dump, and that might be dangerous in that instance. Is that not a fact?

A. Yes; in such an instance it could be.

Q. So a visual look would be preferable. Now, with respect to the crane operator being in a position to see that the men [101] were in the clear—we will put it that way—or the one man, the truck driver is in the clear—you felt that he should be in a position to see that the truck driver is in the clear before he moves the log. Is that not correct?

A. Yes.

Q. Well, now, where the truck driver gives a signal to move the log, don't you feel that the crane engineer has got some work to do in lifting that log to go ahead and move it?

Mr. Sims: Just a moment, your Honor. That is not the state of the record. This witness said he saw a signal and he saw a signal and held his hand in this fashion (indicating), so let Mr. Powers give the true record and not the interpretation of the record. Let counsel show.

Mr. Powers: We will leave it to the jury, if there is any question. Mr. Neal said the truck driver gave him a signal to move the log.

Mr. Sims: Not in that fashion.

(Testimony of Ralph W. Peoples.)

The Court: Objection overruled. You may answer the question, Mr. Peoples.

The Witness: Will you read the question, please?

The Court: Will you repeat the question to him, Mr. Powers?

Mr. Powers: Yes. I will rephrase it this way:

Q. In the Logging Safety Code, a truck driver is prohibited from going between the load of logs and the brow log, is he not?

A. I believe any workman is. [102]

Q. Yes. And that is part of the Safety Code. Now, would you say that in order to have a more safe operation that the engineer, the crane engineer, would have to be in a position where he could see someone, where he would have to get—in order to get there so it would not be a violation of the Safety Code, he would have to see through this log or this load? A. No, sir.

Q. No. And you would agree with me, would you not, that a crane engineer would have a right to rely upon a truck driver when he gives a signal to roll or to lift it, that that truck driver would take a place of safety when there is one open, would you not? A. Not necessarily.

Q. Well, what should he do? Should he continue after the truck driver gives a signal to unload to watch this driver all the time?

A. He should see to it before he starts to lift that the driver is in the clear or that he knows where he is.

Q. Well, now, when the driver gives the signal

(Testimony of Ralph W. Peoples.)

he is in the clear—according to the testimony he is 6 feet back of the log, clear back of the log, when he gives the signal to unload. Do you feel that the crane operator then with his other work should keep watching him, or should he go ahead with his unloading? What would you expect as an engineer in carrying [103] on this work?

A. I would expect that the crane operator should keep his eye on whoever is responsible for giving him the signal to unload in case anything goes wrong so he might respond to any other signal that might be given.

Q. You don't think that he should be actually rolling the log and operating his crane then. He is supposed to be doing both at the same time?

A. He can be doing that and still watch for signals, sir.

Q. In other words, he should not rely, in your opinion, upon a signal given by a driver?

A. Not entirely.

Q. No. Now, let's get to the third point. You felt there should be perhaps another man around there to give a signal, did you?

A. Yes, I think so, and to supervise the general work of the unloading.

Q. Well, now, if you have got another man giving the signal you have got two men to look out for, haven't you?

A. In that case, the man who gives the signal is the one who is responsible for looking out for the truck driver.

(Testimony of Ralph W. Peoples.)

Q. Well, now, if the crane engineer, in operating, doesn't need to be looking at what he is doing and can look at the man giving the signal, the driver, why would you need any second man? [104]

A. We find that it is advisable in operations where numerous trucks are hauling in to have someone in charge to see to it that everybody is in the clear before a signal is given to unload.

Q. You are talking about some other safety engineer, now, aren't you, now—not just an additional workman? A. Sir?

Q. Are you talking about a safety engineer on the job, or just an additional workman around to do that?

A. Well, someone there to supervise the work. Ordinarily they assist in the placing of lines, releasing of binders, and so forth. Their sole duties would not be, in my opinion, just to stand there.

Q. I see. You think someone should be there to help the truck driver get his load ready for unloading. Is that it?

A. And to see that it is safely done; yes, sir.

Q. In other words, there would be two men working around the truck? A. Yes.

Q. Well, now, wouldn't that put an additional man down there, we will say, in a dangerous position? You will have two men there instead of one?

A. Well, that would be one way of looking at it.

Q. And then if they both gave a signal, one man would signal down here and you have to look at

(Testimony of Ralph W. Peoples.)

the other one and where would [105] you stop?

A. No; only one man would give the signal.

Q. Well, so if the truck driver here was one man giving a signal, why wouldn't his signal be as good as some other man's? (Pause.) Well, we will pass that. You are familiar with the rule that the truck driver or the truck hauling logs must have their chains so that they can be unfastened on the opposite side of the brow log, are you not? A. Yes, sir.

Q. And in hauling of logs, there, with your experience, is that not the way that the bunk chains are fixed, so that you can unfasten them from the opposite side of the brow log?

A. That also is required; yes, sir.

Q. That is required, and that is the way it should be done, isn't it? A. Yes, sir.

Q. And if someone had any bunk chains or any binder chains fixed so they would have to go between the loaded trucks and the brow log in order to unfasten it, that would not be a safe practice, would it? A. No, sir.

Q. As I understand your testimony, Mr. Peoples, you felt where there is a large number of trucks coming in maybe an extra man should be there. What if you used a few trucks coming in. two or three trucks a day? [106]

A. Well, normally, sir, where the operation of a log dump is not very heavy—that is, there is not a large volume of logs to be handled—the workmen will take more time to see that proper precautions

(Testimony of Ralph W. Peoples.)

are taken, but as the volume increases there is a tendency to hurry along, and in cases where the volume gets up about——

Q. Not your reasoning about it. What would you say about it where they have only two or three there? Would you say there should be an extra man, or three truckloads a day?

A. No, I think where only two or three truckloads are coming in a day that the operator of the dump machine and the truck driver can successfully and safely handle those without extra help.

Q. So in this case where there were no other trucks there except this one truck which the deceased was operating——

Mr. Sims: Just a moment, your Honor. The only proof on the subject is that there were about twenty trucks, as I understand it, that were coming in here. There is no evidence—and I think I am at liberty to say that there will be no evidence—that this landing ever conducted this operation with two or three trucks coming in a day and no others. The record before us is that there were about twenty trucks making about four trips a day apiece, and in fairness to the jury I don't think counsel should be permitted to pursue this matter where there is only two or three a day, because it does [107] violence to our records and facts.

The Court: Yes. I think that is not the question he is asking, and under admitted facts, Paragraph No. 7, page 3, of the pre-trial order, it is admitted that at the time of the accident there was only one truck on the premises being unloaded.

(Testimony of Ralph W. Peoples.)

Mr. Sims: That's right.

The Court: I think this is proper cross-examination and the objection is overruled.

(Last question read to point of interruption.)

Q. (By Mr. Powers): —where the deceased was operating, no reason why there should be any extra man there at that time, would there be? In other words, under your testimony you say where they just have a few trucks coming in that the driver, himself, is all right. Now, here at the time of the accident the deceased was the only truck driver there. If it worked in one case it should work in another. Is that not right?

A. Yes. It will work any time if they take time enough to make it work.

Q. Well, in this particular case all the arrangements for the unloading and the giving of the signal were up to the deceased, the truck driver—

Mr. Sims: That, again, your Honor, is argumentative and isn't the case.

The Court: I think that that is true. The objection will [108] be sustained.

Mr. Powers: Yes. I should like to give a hypothetical question, then.

Q. Assume, then, now, if you will, Mr. Peoples, that the deceased's was the only truck to be unloaded on the premises at the time of this accident, and assume that the deceased truck driver had no one to help him with his unfastening the load or

(Testimony of Ralph W. Peoples.)

getting the load ready for rolling or dumping, and that the deceased did proceed to get the truck ready for dumping; then, as I understand it, the only one that could be hurrying—or I will put it this way—if the deceased took time and didn't hurry, then there would be no reason why—no reason for requiring any extra man?

A. Well, of course, there are actions of others that might enter in, there, sir.

Q. Just take the hypothetical case, there, because there was no one else there helping him doing that.

Mr. Sims: Just a moment. The evidence is somewhat different. Mr. Vincent was there and did give a signal, and the engineer did unload, he said, on the signal of Mr. Vincent.

The Court: I am going to sustain the objection because I don't think all the facts are presented in the hypothetical question.

Mr. Powers: Yes. Maybe I can stand and present them.

Q. I am talking, now, about this witness' testimony with [109] respect to having another workman or some safety man there. We will put it that way. As I understand his testimony—there may be no need for this—you feel that where the operation is a small one that is not required, and you further feel that one reason for it is that when the operation, there, is only one truck, there, or only a few trucks a day, that they are not hurrying. Is that correct?



(Testimony of Ralph W. Peoples.)

A. Yes, I think that is generally so.

Q. They take more time. Now, I am asking you this question: Where the work of fixing the load, making the load ready for dumping, is done entirely by the truck driver, did you have in mind that the truck driver wouldn't have to hurry so much?

Mr. Sims: That is just the objection.

Q. (By Mr. Powers): Is that what you had in mind?

The Court: Let him answer the question.

A. No; not entirely.

Q. (By Mr. Powers): Who else would be hurrying?

A. The question of the operator of the machine who might not wait for a proper signal or might not take time to see that the person who gives him the signal remains in the clear.

Q. Well, suppose this crane engineer didn't take proper time. Whether you had an extra man there or not, if he isn't going to take proper time he would do it for one man just as well as another, wouldn't he?

Mr. Sims: It is argumentative. [110]

Mr. Powers: This is an expert, here, supposed to be telling the jury what——

The Court: I am going to overrule the objection. Let him answer.

Q. (By Mr. Powers): You blame it on the crane engineer, now?

A. The extra man there would be placed there

(Testimony of Ralph W. Peoples.)

to supervise the work. He would have certain responsibilities. Among them would be to see to it that truck drivers and others did not get in position where they would be endangered by the unloading of the logs and to give the signals, and the possibility of him giving a warning to the engineer if something was wrong, if someone was in a place where they shouldn't be.

Q. You think that second man might take more care of his own protection than the actual truck driver who is down there doing the work?

A. Yes, I think so.

Q. Why? What has been your experience with truck drivers that makes you say that?

A. Well, I find that on some occasions that they get in places where they shouldn't be and get hurt.

Q. Now, is it not the general practice in Oregon for the truck driver where he does his own, makes his load ready for dumping, to give the signal to the crane operator? A. Yes, I think so.

Q. And has it been your experience that no matter how many [111] precautions are taken a certain number of accidents happen, some accidents happen? Is that right?

A. It has been my experience with respect to log dumps that when they are equipped and operated as provided by the safety standards that accidents don't happen.

Q. Never? A. None to my knowledge.

Q. Never happen?

(Testimony of Ralph W. Peoples.)

A. Where they are operated in accordance with safety standards, yes.

Q. Yes. Well, I think perhaps you have in mind all the Safety Code provisions in that respect, do you not?      A. I have those.

Q. Yes. And by that you mean that if the safety provision here were followed that men shall not go between the brow log and the load of logs, this accident here could not have happened. Is that not a fact?

A. That is one of the factors that would have prevented it.

Q. It is a very important one, don't you think? (Pause.)

Mr. Powers: That is all.

### Redirect Examination

By Mr. Sims:

Q. If a truck driver gives a signal to the unloading engineer that "I am going in there to get my chain that is tied to the trailer——" [112]

Mr. Powers: There is no evidence of that, and now at this time I think the Court ought to admonish counsel or instruct the jury to disregard these statements of counsel. We have the depositions—they took the deposition—it is marked here as an exhibit—of Mr. Neal, Mr. Vincent, and Mr. Wood shortly after this accident occurred. There is not a word in that—when they first took this he said that the truck driver gave the signal at the time to unload the thing.

(Testimony of Ralph W. Peoples.)

Mr. Sims: Maybe I can assist counsel a little bit. There will be evidence in this case before this case goes to the jury that the signal that Mr. Neal indicated at the time of the taking of the deposition was a signal, a hand signal, that ordinarily means "I am going in there and get my chain. Hold everything." And if counsel would rather I excuse this witness——

Mr. Powers: I think he ought to have that witness before he asks any questions about it.

Mr. Sims: Very well. I will put Dorsey on and continue with this witness later.

The Court: Is that satisfactory to you?

Mr. Powers: Well, I would just as soon he would go ahead with this witness if he will say he will connect it up. We will get through with one and save time.

The Court: Go ahead. Repeat your question.

Q. (By Mr. Sims): If a hand signal is given by the truck driver [113] to indicate "hold everything. I am going in between the load and the brow log," wouldn't you say that under those circumstances the engineer would be on notice to wait and not to unload, and that that would make a difference as to the conduct of the truck driver?

A. I would say that certainly in those conditions that the engineer should hold it until he was signaled to go ahead.

Mr. Sims: That is all.

(Testimony of Ralph W. Peoples.)

Recross-Examination

By Mr. Powers:

Q. How would you give a signal? Now, let's see you give a signal. You are going in between a brow log and a load of logs. How do you give that signal?

A. The signal is normally used for holding.

Q. Well, you can explain this later.

Mr. Sims: Now, if the Court please——

Mr. Powers: No, this is cross-examination, and I should like to ask this witness, how are you going to give a signal? You are going in between a load and a brow log, and that was my question.

The Court: Answer the question if you can.

A. If I were to give such a signal, I would use both hands, the one hand moved in a horizontal position at or near the waist, and the other hand to point to myself and the position where I expected to go. [114]

Q. (By Mr. Powers): You think there is such a signal that you are going in between the load and the brow log?

A. If I were at the controls of a machine and someone gave me a signal as I have described, I would take it to mean that; yes, sir.

Q. But you have never seen such a signal given to mean that "I am going in between the load and the brow log," have you?

A. Not under those circumstances, no.

Mr. Powers: That is all.

(Testimony of Ralph W. Peoples.)

Redirect Examination

By Mr. Sims:

Q. What is the "Go ahead" signal, the unload signal?

A. Ordinarily the logging signal that is used everywhere for "Go ahead" on any main pulling line is the right hand raised and perhaps shook a little bit to indicate the motion.

Mr. Sims: That is all.

Mr. Powers: We think that last answer should be stricken. The witness here testified what kind of signal is given to unload, and now what is generally given couldn't have any bearing on this case. It is what they were giving down there, what Neal understood. It only confuses the jury, and we move it be stricken.

Mr. Babcock: If the Court please, that isn't quite an accurate statement of the record. The witness Neal testified that the driver gave a signal which he interpreted as a signal [115] to unload, but according to Neal's testimony on the stand was a signal with his body. Neal testified he apparently interpreted that to mean to unload, but this evidence has a further meaning to show that is not an accepted unloading signal.

The Court: Is the signal that you gave that one that is used generally in the logging industry and including Toledo, Oregon, at the C. D. Johnson Lumber Corporation plant? A. Yes, sir.

The Court: Objection overruled.

(Testimony of Ralph W. Peoples.)

Mr. Powers: That is all we have.

Mr. Sims: That is all.

(Witness excused.)

Mr. Sims: There is one question I should ask.

The Court: Mr. Peoples, will you resume the stand?

RALPH W. PEOPLES

thereupon resumed the stand, and, having been previously sworn, testified further as follows:

Redirect Examination

By Mr. Sims:

Q. You were asked by counsel with reference to a signal from whoever was giving the signal to unload, and also with reference to the unloading engineer, keeping the man giving the signal within his observation. What would you say would be a safe practice and proper thing as to both the receiving of the signal and keeping his eyes open for men to see that they were [116] all in the clear?

Mr. Powers: He has been all over this; just invading the province of the jury.

The Court: Objection sustained.

Mr. Sims: Very well.

(Witness excused.) [117]

Mr. Sims: Mr. Dorsey Hutchens.

## DORSEY HUTCHENS

a witness produced in behalf of the plaintiff, thereupon resumed the stand, and, having been previously sworn, testified further as follows:

## Direct Examination

By Mr. Sims:

Q. Dorsey, what type of work do you do?

A. Well, log haul has been my work, and work in the woods. I have run unloading donkeys and loading donkeys.

Q. And for how many years have you done that type of work?

A. I started in 1934, and I have been at it pretty steady ever since.

Q. Were you present at the time Mr. Neal testified on deposition and testified yesterday?

A. Yes, I was.

Q. Are you familiar with the hand signals that are commonly used at the C. D. Johnson unloading dump and generally throughout this area?

A. Yes.

Q. What does the signal he showed and gave at the time of the deposition indicate?

Mr. Powers: The deposition will show that.

Mr. Sims: Why, the deposition won't show the motions.

Q. What signal did he give at the time of the taking of the deposition? [118]

Mr. Powers: We will object to that.

The Court: Why don't you confine it? The witness testified here. Is it a different signal?



(Testimony of Dorsey Hutchens.)

Mr. Sims: Yes; somewhat different, yes.

Mr. Powers: It was up to him to develop that with Mr. Neal. He has had that deposition here, if he found any inconsistency with it.

Mr. Sims: The deposition reads the same if my hand is up here saying "I will unload it," or down here (indicating). The printed page doesn't help us. I will be willing to confine it to just a signal of yesterday.

Q. What was the signal yesterday of Mr. Neal? What does that indicate?

A. I wouldn't say that it indicated unloading it. It was too low a signal even yesterday, and, besides, it was a side signal, which has nothing to do with an unloading signal. A "Go ahead" signal has always meant your right hand up in the air wiggling. Now, it always has ever since I have been in Oregon.

Q. What does a side signal indicate?

A. It means "Hold everything."

Mr. Sims: You may cross-examine.

### Cross-Examination

By Mr. Powers:

Q. Well, now, "Hold everything." You just don't mean to hold everything? You would have your hands flat, wouldn't you? [119]

A. Like this (illustrating).

Q. You would have your hands flat, would you not? Is that not the "Hold everything" signal, hold your hands flat?

(Testimony of Dorsey Hutchens.)

A. Flat, with them moving sideways.

Q. Yes; flat. Did you ever see—you say the signals given by Mr. Neal to go were wiggling his thumb even with his shoulder?

A. There isn't such a signal.

Q. Did you see him give it here in court?

A. I saw him give one sideways.

Mr. Powers: That is all.

The Court: That is all.

Mr. Sims: That is all.

(Witness excused.) [120]

Mr. Sims: Mr. Niles.

### RALPH H. NILES

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Sims:

Q. Mr. Niles, about how old are you?

A. Thirty-nine.

Q. And where did you go to school?

A. Reed College.

Q. And what have you done since you went to Reed College?

A. I have been working with life insurance companies in the actuarial departments.

Q. And are you in any particular department?

Mr. Powers: If he is an actuary, we will admit it as long as he says so.

(Testimony of Ralph H. Niles.)

A. I am assistant actuary.

Q. (By Mr. Sims): And how many years have you been an actuary?

Mr. Powers: We will admit his qualifications.

Mr. Sims: That isn't fair to the jury.

A. I have been assistant actuary for approximately three years in the Standard Insurance Company.

Q. (By Mr. Sims): When did you get out of college?      A. 1934.

Mr. Powers: I don't think it makes any difference when he [121] got out of college.

The Court: Counsel has admitted his qualifications.

Q. (By Mr. Sims): What are the responsibilities of an actuary?

A. An actuary is responsible for determining the rate bases for insurance policies, for determining the premiums charged, dividends, surrender values, all calculations involved in life insurance company operations.

Q. In this particular matter our problem is this: A boy who is 21 years of age and whose wife is 23 years of age, and whose earnings are estimated at averaging \$3,000 annually—the record here shows an income tax for 1949 and it shows \$2127 for the first eight months of 1949, which—assuming that his rate didn't continue quite as good; in other words, say, dropping it down to \$3,000 a year—giving due regard for life expectancy of the widow and the boy who lost his life, and the earnings of

(Testimony of Ralph H. Niles.)

\$3,000—if a life insurance company was to pay a lump sum that would pay to her \$3,000 a year for her life expectancy, what would be the single premium paid to give her such an amount?

Mr. Powers: I doubt if that would be proper evidence, your Honor.

The Court: Well, Mr. Sims, there is no evidence here that she was going to get \$3,000 a year, even if her husband had continued to live.

Mr. Sims: That is true. [122]

The Court: And I don't think that that would be the proper measure of damages, based upon the full \$3,000 a year.

Mr. Sims: Well, the evidence shows that all of his money was being used, you might say, for family purposes.

The Court: He used some of it for himself.

Mr. Sims: That is right, and it cost him something to equip himself for food and clothing and medical and dental expense. I have that in mind, too. But my question of \$3,000—I felt it contemplated that because our record here shows \$2127 income in '49 from January to August. Now, probably his earnings—of course, he was only 21 years of age—would have increased. I realize that it isn't a mathematical and exact thing, and no one in the world could say that this lady would receive exactly \$1,500 benefit a year, or \$4,000 benefit. It is simply some evidence which I feel would be helpful.

The Court: Are you only assuming it on the

(Testimony of Ralph H. Niles.)

basis of \$3,000, or are you giving the witness—do you intend to ask him about other figures?

Mr. Sims: I was going to give other figures. I might interrupt my question——

Q. Mr. Niles, how many other figures did you use in arriving——

A. I can give it on the basis of \$1,000 and \$3,000. I could give testimony on the basis of \$1,000 and then any other yearly figure could be computed by simple multiplication.

Q. May I then modify my question upon the basis of \$1,000 a [123] year instead of \$3,000.

A. You want to know what a life insurance company would charge for a life annuity of \$1,000 a year for a woman aged 23?

Q. That is right. A. That is \$33,917.

Q. \$33,917? A. Yes.

Q. And as I understand you, that would increase or diminish according to the rate that it might be found that she would receive; that is to say, if it was upon the basis of \$500 a year it would be half that amount?

A. That is correct.

Q. If it is on the basis of \$3,000 a year it would be three times that amount? A. That is right.

Mr. Sims: You may cross-examine.

Mr. Powers: I have no questions.

The Court: Was that figured on the basis of a man who is 21 years of age?

A. No. That is a woman aged 23.

Mr. Sims: She is 23, your Honor.

(Testimony of Ralph H. Niles.)

The Court: I think that the only purpose of this question is to determine whether or not she had as great a life expectancy [126] as he did on the date of death of the decedent, and I think your answer is that she did; is that right?

A. I would say—based on the knowledge, I would say she had a greater life expectancy than he had.

Mr. Sims: That is all.

The Court: Any questions?

Mr. Powers: No.

(Witness excused.)

Mr. Sims: May we have just a moment? I think the plaintiff rests.

Mr. Babcock: Plaintiff rests, your Honor.

The Court: One second before you rest. Are you of the opinion that you introduced all the exhibits you proposed to introduce?

Mr. Sims: We have introduced the photographs, the income tax records——

The Court: What?

Mr. Sims: Oh, the safety codes that I believe your Honor marked as exhibits should go in.

The Court: Nothing has been offered except the photographs. That is Exhibits 2 to 14, inclusive.

Mr. Sims: The income tax records, I believe, if your Honor will review his notes, were received without objection. I asked the Court if we might

read that at the time of argument, [127] and that was allowed by the Court.

The Court: Do you have them here?

Mr. Sims: Yes, they are here. The clerk has them.

The Court: It is 19 and 20?

Mr. Sims: That's right.

The Court: 19 and 20 admitted.

Mr. Sims: 15 and 16, there was a duplication as to that. Mr. Powers stipulated as to 15 and 16.

The Court: The funeral and burial expenses, the amount was stipulated at what figure—nine hundred and some dollars? You didn't have the exact figures.

Mr. Sims: \$974.71, the stipulation is.

The Court: \$974.71?

Mr. Sims: Right.

The Court: Have you examined the documents which support it, Mr. Powers?

Mr. Powers: No, but I told them I would take their word for it. I think they meant it.

Mr. Sims: Well, if you would like to see these——

The Court: Have you already stipulated——

Mr. Powers: I stipulated—I said if they would say that is what it cost them for funeral expenses I would stipulate it. I said if counsel would say it.

Mr. Sims: Here are the bills. Perhaps we had better offer them in evidence. [128]

Mr. Powers: We will stipulate as to it.

The Court: \$974.71 is the stipulated amount

that plaintiff has incurred in connection with the burial expenses.

Mr. Sims: And that this amount is the reasonable amount.

Mr. Powers: Yes; as they testified.

Mr. Sims: Now, the Safety Code was marked as 17 and 18. We want to offer those in evidence at this time.

The Court: Any objection, Mr. Powers?

Mr. Powers: No, I wouldn't object to the offering.

The Court: 17 and 18 are admitted.

(The pamphlets, so offered and received, were thereupon designated as follows: "Safety Code for Sawmill, Woodworking and Allied Industries of Oregon" as Plaintiff's Exhibit 17; and "Logging Safety Code" as Plaintiff's Exhibit 18.)

The Court: Is that all?

Mr. Sims: I think that is all, your Honor.

The Court: And plaintiff rests.

Mr. Powers: Do you want to proceed now outside the presence of the jury? It doesn't matter. We have a motion, your Honor.

The Court: You have a motion?

Have you a short witness that you can put on now?

Mr. Powers: Yes, if the Court wants to hear him without waiving our motion.

The Court: It is a quater of twelve. How long do you think it is going to take you to put on your case? [129]



Mr. Powers: Just a very short time, your Honor.

The Court: A very short time?

Mr. Powers: Yes.

The Court: Are you in a position to argue the case this afternoon?

Mr. Powers: I would be.

The Court: We will excuse the jury until 2:00 o'clock.

(Thereupon the jury was excused until 2:00 o'clock p.m. of this day, Wednesday, June 21, 1950, and the following occurred without the presence of the jury.)

Mr. Powers: Comes now the C. D. Johnson Lumber Corporation and moves the Court for an involuntary nonsuit on the grounds and for the reason that there is no evidence in this case to support a violation of the Employers' Liability Act of the State of Oregon. There is no evidence on which the jury could return a verdict of a violation, so we submit to your Honor that we are entitled to a nonsuit at this time, and in that connection I will call your Honor's attention to the recent authorities which have held that a man, where he is responsible for making his own working conditions, is not entitled to the protection of the Act if he fails to take a safe position if there is one open to him. We further call your Honor's attention to the undisputed evidence in this case that the deceased was the one in charge of the truck and the fastening of the chains [130] and un-

fastening of the chains and making it ready for the unloading, and through no stretch of the imagination could it be argued or could a jury of reasonable-minded persons find from anything in this case that there was any defect in any of the equipment or machinery of the C. D. Johnson Lumber Corporation.

Now, the Employers' Liability Act is designed to impose upon employers a standard of care with respect to the equipment and machinery and operation carried on. It is not designed and it has never been so held to apply to what would be common law negligence of some individual working for that employer. It is obvious when an accident occurs through some faulty machinery, equipment, or arrangement, that the Employers' Liability Act applies, and not such as this would be the situation here. Now, the only evidence in this case is—and that is the evidence of the plaintiff. The plaintiff subpoenaed these witnesses, and, in my opinion, your Honor, when you refer to adverse witnesses, these witnesses were not adverse witnesses. They were not made adverse witnesses under the statute by counsel. Those witnesses, then, the testimony of the plaintiff, is that the crane engineer got a signal from the deceased to unload. In abundance of caution he asked the other man to check on the pond, too. Where, then, is there any evidence of negligence? At most, there might be some kind of an inference, but you cannot base an inference on an inference. [131] Under the undisputed evidence in this case, there was no vio-

lation of the Employers' Liability Act, and, in fact, there was no negligence on the part of the engineer. There is no evidence contradicting it, not a word. I would like to have counsel point out, then—where is the violation of the Employers' Liability Act?

Now, in that respect, I should like to refer your Honor to the pre-trial order and see what they claim. Invariably in these cases there is set forth what could have been done that would have made the operation without impairing the efficiency, safer. Now, what do we find? We find their first specification of negligence is a violation.

The Court: On page 8?

Mr. Powers: Yes; thank you; a violation of the Safety Code for sawmills.

Now, the evidence in this case indicates clearly there was no sawmill operation actually involved, that the logs were being delivered and logs were being rafted; they were not sent into any sawmill. After they got down here they were put in boom sticks 65 feet long and towed to wherever they might have to go. We submit as a matter of law there is no sawmill involved, but we submit the more critical point with respect to that charge of negligence that the Employers' Liability Act sets forth the standard of care. You cannot go out and take some other law and even draft that law onto [132] the Employers' Liability Act, and they cannot enlarge upon the Employers' Liability Act by picking out some other law which a violation—would be a common law, perhaps, but certainly

there is no requirement in the Employers' Liability Act that anyone specifically complied with that law, so we say that that is—they could never recover under the Employers' Liability Act for violation of some other law. Under the Employers' Liability Act, the defendant is stripped of his common-law defenses. Under that other act he is not stripped of his common-law defenses. You can see where we would be getting to—a violation of a sawmill code. In the first place, a sawmill is not mixed up in it; and, in the second place, a violation of some other law would not be a violation of the Employers' Liability Act; so we submit that there is no basis for recovery under 1.

Now, in failing to require that all signals for the unloading of logs should be given from a single designated person, there is no evidence from which the jury could find that there was anything here other than the designated person who was the truck driver. A designated person, here, was the truck driver. That is what all the testimony is. There is no evidence that it would be any safer anyway. The evidence, as a matter of fact, indicates that where there is just one truck it is just as safe for the truck driver to give it as anyone else, and probably safer than to have two men around; [133] and, furthermore, that that is the general practice in Oregon.

Now, the Employers' Liability Act was not designed to make up these far-reaching theories, certainly, to maintain an action. If there is a breach of the common law they have an action at common law where there is a limit of liability of \$15,000,

or if he was an employee, as they claim of Francis, he has his claim against—if they could make that stick, under the Workmen's Compensation Act.

Now, with respect to No. 3, in failing to provide a sufficient number of workmen. Well, now, where there is one truck involved, the expert said it would be the ordinary practice and a safe practice to have the truck driver give the signal.

Now, in 4, there, they go back to the provisions of the Logging Safety Code. The Logging Safety Code would have some application, because that is what they were actually engaged in, but a violation of that logging code could not be engrafted onto the Employers' Liability Act, we submit, your Honor, and no recovery could be made under the Employers' Liability Act for the violation of some other law, and, furthermore, there is no evidence that there was any violation of the logging code on the part of this defendant.

Now, with respect to 5, in causing the log to be unloaded from the truck without notice or warning to the decedent and in violation of Section 612 of the Sawmill [134] Code—well, the sawmill code is not involved and the only evidence involved here is that the decedent, himself, gave the signal to unload it.

Now, No. 6—in failing to provide the unloading machine with an audible warning device and in failing to sound an audible warning device. Well, it is admitted and the expert so testified that a visual inspection is better than any audible device

anyway, to look and actually see rather than just to blow a whistle and do something.

7, in failing to have stationed at the unloading dock an additional employee. Well, there is no evidence to support that, that it would be a violation of the Employers' Liability Act. That is a repetition of the one I discussed above.

Now, we have 8, the sawmill safety code, again. That just cannot be engraved upon the Employers' Liability Act to make out a case. There is no basis there.

No. 9, in giving the signal to unload the log and in causing it to be unloaded at a time when its agents knew, or by the exercise of due care should have seen, the decedent in a place of danger. There is no evidence that they knew he was back in there or would have any reason to know he was back in there, and the evidence is that the only signal other than the decedent's signal was the one that the pond was clear, and in connection with this last specification, the testimony [135] is entitled to the presumption that the decedent would be in the exercise of ordinary care, and that the decedent would not violate the Code provision and place himself in a position between the truck and the brow log. There is that presumption, and there is no evidence to overcome that, and we had a right to rely that he wouldn't do that, and, as the testimony shows, if he got back in there nobody could see him, so we submit that under none of their specifications are they entitled to have this case go to the jury

on any claimed violation of the Employers' Liability Act.

The Court: Mr. Powers, I want to get your position clear.

Mr. Powers: Yes.

The Court: Are you contending that in order for one to come within the provisions of the Employers' Liability Act it is necessary that he prove that there was a defect of a mechanism or equipment? I thought you were making that argument, that if there is negligence of a fellow employee that that is not sufficient.

Mr. Powers: I make this point: That it is not sufficient to show a violation of the Act that there is a human failure. There has got to be—and it applies only in cases where there is some unprotected machinery, apparatus, or device which is used in connection with carrying out the work or the operation. The mere fact that an employee does something is not sufficient. The mere fact that an employee would do [136] something—in other words, the legislature never had in mind saying to an employer, “Now, look, you. If you get some employee down here that commits a negligent act we are going to take all your defenses away from you.” No, what they are saying is an outgrowth of the old factory act. It says what you must do, and the first section says what you shall do where certain appliances—the first part of this Act relates and specifies the appliances and equipment, and so on, that an employer must have. That is the specific part of the Act. Now, there is the

“and generally” part, and that relates and is carried through to mean some device, some machinery, some such equipment used in the work that you could protect a workingman against such as a safety guard over a saw. It does not mean an individual employee. How could an employer ever be said to be guilty of a violation of the Act because one man might be better than another? How could you protect yourself? You just couldn’t, and the Act doesn’t apply to that type of situation.

And we move for a non-suit on the further ground that it appears affirmatively from the evidence that the deceased was the one that was actively in charge of the equipment of the truck and the chain and the bunk blocks, and the only things that might possibly be said to have been negligently attached or defective in some way. There might be some inference there was something wrong with that equipment, and, [137] on the other hand, there is no evidence that there was anything wrong with ours, with this defendant’s, here; and on the further ground that it was the deceased, himself, who made his own working conditions, and that there was a safe place to go, and that it appears that he got into a place where he is forbidden to go by law.

So under those circumstances we submit to your Honor we are entitled to a judgment of involuntary non-suit.

Mr. Babcock: If the Court please, taking Mr. Powers’ points in order, the first being that the evidence shows that the decedent was in charge of



the operation, presumably that ground for his motion is based on such cases as *Robin vs. Erwin*, where the head faller was injured. The evidence conclusively shows in this case that the decedent was not in charge of the operation, that he simply performed certain menial tasks in connection with the unloading of the logs, that the unloading engineer——

The Court: I think it might be a question we should submit to a jury, but it certainly is not a question that——

Mr. Babcock: At the best, I would submit that it is a question for the jury, and in our view of the evidence as it stands now, the evidence is conclusive on the point that it was the defendant who was the owner and in charge of the work and specifically it was the engineer who was the supervisor or employee of the defendant and was in charge, and he was the [138] one who applied the power and controlled the application of the power and energy to move the log.

With respect to the second point, namely, that there must be a defect in machinery or in physical property shown, that is certainly a new one to me, because the cases have been proceeding on the other theory for a great many years. The Act, itself, provides that the employer or owner is responsible for the acts of the person in charge of the work or the particular part of the work involved. It also provides that the fellow servant defense is no longer available, and if the Court deems it necessary I think we can go through the

cases and find case after case where the accident was the result of the mistake, inadvertence, or negligence of some other employee or supervisor.

The Court: That has been my opinion, Mr. Powers, all along, and I was quite surprised when this contention was advanced. None of the cases which you have cited seem to bear out that contention, Mr. Powers.

Mr. Powers: Well, I feel that they all bear it out, your Honor. It is a reading of the cases—the Ninth Circuit Court of Appeals, Smith against Shevlin-Hixon. Now, there was a woman that had to get up and down, jump down in a thing, and the Circuit Court of Appeals points out that our argument here, that this thing was so close to where she actually had to work, she was carrying on her work where she had to be and [139] jumping down—having an apparatus where she had to jump—they thought might be a violation of it. But now here is what your Honor is faced with in this case. Are you going to say that an employer is in violation of the Act where some employee has gone in violation of the law into a position of danger, where he is not allowed to go by law, where, under the evidence, there is a safe place for him? Now, if you read that Robin case, the one I just talked about, you will see what the Supreme Court of Oregon has said. If you read also that case where a log rolled off on a man and killed him, it is the same way. It is a stronger case where a non-suit was granted.

The Court: Well, in the absence of some au-

thority to the effect that when a man is working in a place of danger or in a hazardous occupation and at a place of hazard, even though he may be injured by the negligence of a fellow servant, he may not recover under the Employers' Liability Act—in the absence of such a case I am going to overrule that particular request. If you have such a case, Mr. Powers, I wish you would submit it to me sometime this afternoon, because I think you are correct, here, in your statement that the plaintiff has not shown any defect of equipment here.

Mr. Babcock. We haven't claimed it.

The Court: No. I appreciate that.

Mr. Powers: I don't know if your Honor has read the case [140] of Jackson vs. Oregon Lumber, 152 Or. I think that those situations are similar. I should like to call your Honor's attention to Perreti against the Southern Pacific, which is right in this Court.

Mr. Sims: Well, the Shevlin-Hixon case, the Galina Smith case, there was no claim of defective machinery or equipment, and in that case the Circuit Court of Appeals made it abundantly clear, I thought, that it was simply a question of whether every care, device, and precaution was taken, and the fellow servant negligence goes right to the very heart of that problem, here. The engineer said that he didn't know where Dean Hutchens was when he unloaded, since he could have looked again but didn't; so that surely would carry it to the jury. Now, was every care—we are talking

about care, not device, now, just care—taken? What is meant by “care”? Just a glance, the slightest turn of his head or rolling of his eyes and this fatal accident would not have occurred. That is the state of this record. The Act, itself——

The Court: What is the third point, Mr. Babcock?

Mr. Babcock: His third main point was that there was no evidence to support the specifications of negligence.

The Court: There is evidence. Mr. Peoples testified as an expert that they should have taken certain precautions, and then apparently there is a conflict in the evidence as to what the deceased did, as to whether he waved his finger in [141] one position or in another position.

Mr. Powers: Where would the conflict come from? There was only one witness. The other witness said what he saw here in court, and I would like the reporter to get that transcribed for your Honor. He said he gave the highball signal to unload.

Mr. Babcock: He did not, your Honor. I watched him particularly, observed in the deposition. The signal was not an overhead signal.

Mr. Powers: I wasn't there when the deposition was taken, but it is indicated it was a signal to unload.

Mr. Babcock: The jury observed the signal on the stand.

The Court: I didn't see—there are two witnesses, Mr. Powers, to the effect that the “Go

ahead" signal is an overhead signal, waving the finger above the head, the right hand, and the witnesses who testified earlier testified that he had given a different kind of a signal.

Mr. Babcock: It was more like this (illustrating).

Mr. Powers: Will you get that out, Glenn?

Mr. Sims: The witness Neal waves his thumb about waist-high, and Mr. Neal did not raise his hand above his shoulder or his head.

Mr. Babcock: Mr. Neal testified and nodded that he gave his signal with his hand, and it wasn't as Mr. Powers has suggested. But at any rate the jury observed that. [142]

Mr. Powers: Will you agree with me that he stated he gave a signal to go ahead and unload?

Mr. Babcock: Something to that effect. In any event, Neal's testimony was to the effect that he so understood the signal. That is true. We would like to make this observation with respect to the application of the Safety Code. Mr. Powers has stated the sawmill safety code has no application, which certainly I cannot agree with. This pond was operated in connection with a sawmill.

Mr. Powers: No, it wasn't. There is no evidence to that effect.

Mr. Babcock: It is stated right in the agreement with the agreed statement of facts.

Mr. Powers: We agree that the defendant operated a sawmill, but not that this——

Mr. Babcock: In connection with its sawmill, the defendant operated a log and loading dump on the Yaquina River.

Mr. Powers: That's right; not as a part.

Mr. Babcock: In connection with. All log dumps are operated in connection with a sawmill. Now, the fact is, your Honor, that you will find by comparing the codes that the logging code which was the earlier code covered log unloading, as also did the sawmill code, which is a later code, and to a large extent the provisions are identical.

Mr. Powers: In the sawmill code they have added a few [143] additional provisions, and in the pre-trial order and our contentions, we have referred to both, and where they were the same we have alleged both, and both the log and sawmill, logging and sawmill, safety codes govern this type of an operation, and they make it quite clear, both of them. They contain the express provisions, that all men shall be in the clear when the logs are dumped. The sawmill code contains an additional phrase and a signal given before logs are dumped. Now, I don't think it is necessary for me to go into great detail, because I think quite clearly that there is evidence supporting each and every specification of negligence that we have charged in the pre-trial order.

The Court: I will deny the motion for an involuntary nonsuit or dismissal.

Mr. Powers: Exception, please.

The Court: We will now adjourn until 2:00 o'clock, but before we do I want to again ask—Mr. Powers, do you think your case will take two hours to put on?

Mr. Powers: No, I don't.

The Court: An hour?

Mr. Powers: An hour or hour and a half, depending on how long they cross-examine.

The Court: And do you want to argue the case this afternoon and instruct tomorrow morning?

Mr. Powers: I prefer to instruct tonight. [144]

The Court: You gave me your instructions less than a half hour ago.

Mr. Powers: They are just common ordinary instructions. Of course, I went on the basis you had to finish tonight.

The Court: Yesterday I told you——

Mr. Powers: And I have something set in another court.

Mr. Sims: The Court told us yesterday we did not have to finish today, and the Court said definitely the Court would instruct in the morning.

Mr. Powers: The Court said that, but I am telling what I did. I set a motion tomorrow morning, because I thought we would get through, that can't ride over. I think we can reach the point, and I am shortening up my case so we can get through today if possible.

The Court: Off the record.

(Discussion off the record.)

Mr. Sims: I certainly hope the Court does instruct in the morning, because I always feel that to give a case to a jury in Federal Court late in the afternoon is an invitation to a disagreement, and we haven't had the benefit of counsel's——

The Court: Do you propose to argue the case this afternoon?

Mr. Sims: Yes; I assume we can do that this afternoon, assuming he will get through in an hour or so.

The Court: Adjourn until 2:00 o'clock.

(Thereupon a recess was taken until this afternoon, Wednesday, June 21, 1950, at which time the following further proceedings were had herein:) [145]

Mr. Powers: Are you ready to proceed, your Honor?

The Court: Oh, yes.

Mr. Powers: We will call Mr. Calavan, please.

### DELWIN CALAVAN

was thereupon produced as a witness in behalf of the defendant, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Powers:

Q. State your name for the jury, please.

A. I am Delwin M. Calavan, commonly known as Mac Calavan.

Q. And where do you live, Mr. Calavan?

A. Toledo, Oregon.

Q. And you have been a resident of Oregon for how long?      A. All my life.

Q. And you are how old?

A. Thirty-four years.



(Testimony of Delwin Calavan.)

Q. And how long have you been in the logging work?      A. Continuously since 1934.

Q. Now, you have been in it continuously, then, for a period of sixteen years?      A. Yes.

Q. Where are you employed now? Where do you work?

A. I work for the C. D. Johnson Lumber Corporation.

Q. And what is your work? What are your duties there?

A. I am chief scaler and directly in charge of all water [146] operations of the C. D. Johnson Lumber Corporation—in other words, supervisory boom foreman.

Q. Now, what other experience have you had in the logging business? What did you start doing when you went in the logging business?

A. I started in the logging business in 1934 as a cat driver and bulldozer.

Q. Working in the woods, then?

A. Working in the woods.

Q. And you worked in the woods for some time?

A. I worked two years on this particular job, and at that time I also did the high-climbing.

Q. You did high-climbing?

A. That's correct.

Q. What is high-climbing? What does that mean?

A. That is the—the high-climber is the man that goes up and tops the tree before the rigging is put in for rigging up for logging.

(Testimony of Delwin Calavan.)

Q. In addition to high-climbing and running the cat, what else have you done in the logging business?

A. I have run a tugboat, scaled logs, drove log truck, and worked in supervisory capacities.

Q. And you say you have worked as a truck driver, driven log trucks? A. I have. [147]

Q. Now, when are the logs scaled that are delivered in the river, there, such as the logs we are talking about here from Francis?

A. May I ask a question there? For payment?

Q. I don't know about the payment, but I mean when do you count up the logs that are sent in or that you get from Francis under that contract?

A. When they are in the raft.

Q. I see. And how do you know which logs he has brought in?

A. He has a brand which is registered on them.

Q. And who counts those logs and figures out the number of feet?

A. I, myself, make the calculations as to the amount of lumber there are in the logs.

Q. In other words, that is the job of the scaler?

A. That's correct.

Q. And you are the chief scaler?

A. That's correct.

Q. Now, on the logs that are brought in, is there any count made of them under that contract until they are scaled, as you are talking about?

A. After they are brought in? No.

Q. Well, they are never counted by C. D. John-

(Testimony of Delwin Calavan.)

son Lumber Company—I will ask you: Are they counted by C. D. Johnson Lumber Company up until the time they are scaled in the water? [148]

A. No.

Q. And under the contract these logs were to be delivered where?

Mr. Sims: I don't get the materiality of this, your Honor, how it could be helpful to the jury on the question of negligence or contributory negligence, but I don't see where we are going. I wonder if counsel could help us. It is interesting to go into how they scale and when they pay and all that, but does it help here? It is not a matter of issue here.

The Court: Mr. Powers, I think this is the first time it has come up, actually, but I have already indicated how I am going to rule, and therefore I will sustain the objection. I can't see the materiality.

Mr. Powers: I would like to make an offer of proof. I can't see any harm in making it at this time and before the jury. I mean I will ask the witness a question and——

Mr. Sims: Well, that is a little unusual. Any business has its problems. I would be glad to step with counsel in chambers if he likes.

The Court: I think that would be the better procedure. You ask some other questions, and then we will take the offer of proof at a later time.

Q. (By Mr. Powers): Where is the logger to

(Testimony of Delwin Calavan.)

deliver the logs? Where must he deliver the logs to the C. D. Johnson Lumber Company?

A. In the water. [149]

Mr. Sims: Of course, that is the same objection. I move it be stricken. It is calling for a conclusion. It doesn't conform to the record in this case, and it is not an issue.

The Court: I don't know whether it is that, but I am going to sustain the objection, and the jury is instructed to disregard the answer.

Mr. Powers: I don't believe I followed the basis of his objection being sustained. What is the basis of it?

The Court: Well, I think we argued that out before, Mr. Powers. I know your contention of independent contractorship, and I don't think it has any applicability here.

Mr. Powers: Well, what I want to get at is, are we estopped from showing what the logger was to do, where he was to make the delivery?

The Court: I think the only question is whether or not they were engaged in a common enterprise and whether or not the plaintiff's decedent was on the premises lawfully, and as long as that is shown I think the Act would apply.

Mr. Powers: How else can I show it?

Mr. Sims: Counsel has admitted he was there lawfully.

The Court: Are you contending plaintiff's decedent was on the premises unlawfully, or was a trespasser?

(Testimony of Delwin Calavan.)

Mr. Powers: I am asking the Court if the Court doesn't want me to show where the logger was to deliver the log. That would bring him on the premises so he could put it in the water, [150] and I so stipulated the other day, that he had a contractual right to come upon the premises, and that is as far as my stipulation went. There is no evidence yet as to whether he was an employee, contractor, or what he was.

The Court: Go ahead. I don't see the materiality, but I just——

Mr. Powers: Yes.

Well, then, he answered that the logger delivers it in the water, and I understood the Court to have stricken that.

The Court: That's right. Ask him the other question.

Mr. Powers: Which one is that, your Honor?

The Court: You can ask the question over again.

Q. (By Mr. Powers): Where, under the arrangement, there, was the logger to deliver the logs?

The Court: That is not the question. I am going to sustain that. If you want to make an offer of proof you can make it at this time.

Mr. Powers: If the court reporter will read the other question you had in mind, then I will ask it again, whatever it was. I thought that was the one you wanted asked.

(The question referred to was read as follows: "Question: Where is the logger to deliver

(Testimony of Delwin Calavan.)

the logs? Where must he deliver the logs to the C. D. Johnson Lumber Company?")

Q. (By Mr. Powers): I will ask, where was the logger supposed [151] to deliver the logs?

A. In the water at Toledo.

The Court: Go ahead.

Q. (By Mr. Powers): Are you familiar with the Logging Safety Code? A. I am.

Q. And what is the general practice as to who gives the signal to the unloading engineer in a logging operation of this nature?

Mr. Sims: Now, the general practice, of course, would not make any difference and wouldn't be any defense. The Employers' Liability Law requires the employer to use every care, device, and precaution. That duty is continuing and cannot be delegated to any——

The Court: That's right, Mr. Powers. If you want to ask him what happened over here it is all right.

Mr. Powers: Well, they were talking about what was good practice, and I should think that one measure would be the general practice.

The Court: What the general practice is doesn't affect the question of whether or not C. D. Johnson Lumber Company complied with the Act.

Q. (By Mr. Powers): Have you been around the other logging operations to any degree at all?

A. Yes; considerably.

Q. Have you ever found any place that had an

(Testimony of Delwin Calavan.)

extra man to give [152] a signal other than the truck driver in an unloading operation in any of the other operations?

Mr. Sims: Just a moment.

The Court: Objection sustained.

Q. (By Mr. Powers): Well, I will ask you, then, now, in your experience would another man under the circumstances that we had present here be of any help or make it any safer to give a signal to the crane engineer other than the truck driver?

A. No.

Q. Mr. Calavan, when did you first hear of this accident?

A. I heard them blow the whistle on the donkey that there had been an accident.

Q. I see. Where were you then?

A. Approximately, oh, approximately 300 yards. I was in the C. D. Johnson office.

Q. And what did you do?

A. Well, as I remember——

Q. I mean, what did you do with respect to going down to where the accident occurred?

A. I went out there.

Q. Immediately, or how soon?

A. Immediately.

Q. Did you hurry?

A. To a certain extent, yes.

Q. Now, you got to the scene of the accident about how long [153] after it happened?

A. I would say three minutes.

(Testimony of Delwin Calavan.)

Q. Did you make some investigation there?

A. Yes, I did.

Q. And can you state to the jury whether there were any binder chains on the truck or around on the ground, there?

A. There were two binder chains in the jockey box, as I remember, on the back of the truck where they had been thrown when the truck driver readies himself for the unloading.

Q. Now, let's see—where is the jockey box on the truck?

A. Directly behind the cab of the truck, and the frame that the trailer tongue sits into.

Q. You found no binder chains on the ground at all?      A. None.

Q. They were in the jockey box. What about the truck, itself? Had the bunk chains been released for unloading?      A. They had.

Q. Now, will you state to the jury whether a bunk block can be released, or on this truck could be released, from the opposite side of the brow log?

A. It could. It was a regular logging truck, International and green in color.

Q. In the unloading operation there, is there anything in connection with the driver's work that would require him to go between a load and the brow log? [154]      A. No, there isn't.

Q. You heard the testimony of Mr. Neal as to the position that the driver was in when he gave the signal to Mr. Neal. How far was the driver,



(Testimony of Delwin Calavan.)

approximately, from the position he was in to where the crane engineer was?

Mr. Sims: Well, now, just a moment.

Would you read that question, please?

(Last question read.)

Mr. Sims: Well, if he knows, that is all right.

A. That would be a distance of approximately 30 feet.

Q. (By Mr. Powers): And this particular log that was unloaded that day that has been described, do you know the size of it, the length of it?

A. I do.

Q. Did you scale it? A. I did.

Q. How long was that log?

A. That log was 40 feet long.

Q. 40 feet long. Now, who, in connection with the unloading operations, makes the truck and load ready for unloading? A. The truck driver.

Q. Are there any employees of the C. D. Johnson Lumber Company that assist in what the truck driver is doing at the truck?

A. No, there are not.

Q. Does the crane engineer ever leave—does the crane engineer, [155] in connection with this type of operation, ever leave the seat, or wherever he is operating the crane?

A. Not at the time the trucks are to be unloaded, no.

Q. There is not, then, an intermingling of any employees of the C. D. Johnson Lumber Company

(Testimony of Delwin Calavan.)

and the truck driver and what the truck driver is doing. Is that correct?

Mr. Babcock: Your Honor, we object to that. It calls for a conclusion and opinion, and I think the facts are in evidence.

The Court: Objection sustained.

Q. (By Mr. Powers): Does the crane operator attempt to give any—show the truck driver how he should get the truck ready for unloading, or is that up to the truck driver?

A. The only thing that the crane operator does is give him a signal when he stops where to stop his truck.

Q. As far as getting the chains loose, the bunk blocks out of the way, and the loading line around the log, and the giving of the signal, that is up to the truck driver working by himself. Is that correct? A. It is.

Q. Now, the particular brow log that was involved in this accident, how long has that log been there? A. Approximately two years.

Q. And the one next to it, that is the last one to the south. Is that correct?

A. The one that the truck was at at the time of the death has [156] been there about two years.

Q. Yes. And then you have three there altogether, have you not? A. We have three.

Q. And how about the one next to it, the one in the middle? How long has that been there?

A. That was replaced after I went to work for C. D. Johnson.

(Testimony of Delwin Calavan.)

Q. How long ago was that?

A. That was five years ago June the 18th.

Q. Mr. Peoples, who testified here this morning—are you acquainted with him or any position he occupied while he was in Oregon other than what he stated?

A. I have heard the name and have met the man, yes.

Q. Did you meet him in any capacity of the business agent or representative of the CIO?

Mr. Sims: Now, if the Court please, I don't know how that could possibly be made material. It could only be asked for the sake of attempting to raise some prejudice. It was not gone into in any way with the witness, and, regardless of what the answer is, it couldn't make any difference here. could serve no legitimate purpose, whether he belongs to one union or another union or no union.

The Court: Objection sustained.

Mr. Powers: He testified what his activities had been. I don't know as it makes any particular difference, but that [157] is what I understand to be the case.

Q. Now, Mr. Calavan, the deceased had been coming into the unloading dock there for a period of about how long?

A. Mr. Francis started logging, as I remember. in June, and, not having been personally acquainted with Mr. Hutchens, I could not say the exact amount of time. However, this was in August.

(Testimony of Delwin Calavan.)

Q. So this was some two months after Francis had started hauling. Is that correct?

A. That's correct.

Q. Now, Mr. Neal, he has worked there ever since you have been there, has he?

A. Mr. Neal was there when I took this job, yes.

Q. And have you had any experience in operating a crane? A. I have.

Q. You know how to operate a crane?

A. I can run that one.

Q. Now, Mr. Neal, in his experience—you are in a supervisory capacity—his experience as a crane operator was what?

A. Well, all I can say is as a crane operator he was there when I came, and he has been on it ever since, listed as donkey engineer.

Q. Do you know whether he knows whether a signal is one to unload or not?

A. He knows. [158]

Q. And how has Mr. Neal been in the operation of the crane as being a careful operator or otherwise?

Mr. Sims: I don't see how that could be material.

The Court: Objection sustained.

Mr. Powers: He works for this man in a supervisory capacity.

The Court: Did you see him at the time this log was unloaded?

A. Did I see Mr. Neal at that time? I was there about three minutes after the accident.

(Testimony of Delwin Calavan.)

The Court: You didn't see the unloading of that log?

A. I didn't see the unloading of that log. I was working at my desk.

The Court: Objection sustained.

Q. (By Mr. Powers): Immediately after the accident, did Mr. Neal state to you anything about——

Mr. Sims: Now——

Mr. Powers: Just a minute, please.

Q. ——about how the accident happened, what signals, if anything, had been given?

The Court: Objection sustained.

Mr. Powers: Part of the *res gestae*, within three minutes after an accident happens when a death is involved, certainly——

The Court: Objection sustained.

Q. (By Mr. Powers): And you were there for the purpose of investigating into any part of the accident?

Mr. Sims: I object to these leading questions. This is [159] a Company representative, and counsel is giving him the answers.

Mr. Powers: I am asking if he was there to investigate it.

The Court: You may ask the question if he was there to investigate.

The Witness: Would the reporter read the question?

Mr. Powers: I will ask the question.

(Testimony of Delwin Calavan.)

Q. Were you there to investigate into the accident to see what had happened?

A. I knew that someone had been hurt, and I was there to see what could be done, yes.

Q. And Neal made a report or statement to you as to what happened. Is that correct?

A. Mr. Neal and Mr. Vincent, both.

Q. And you accepted that in the regular course of employment, there, as their supervisor?

A. I did.

Mr. Powers: I assume the Court wants us to make an offer of proof as a part of the res gestae——

Q. And you didn't ask them any questions, and you could have then——

The Court: Are you trying to impeach their testimony?

Mr. Powers: No. I am just trying to show this is what was stated at the time.

The Court: Objection sustained. [160]

Q. (By Mr. Powers): In the work that the deceased Hutchens was doing, did you or anyone else try to tell him how to get his load ready for unloading?

Mr. Sims: He has already asked that and it has already been answered.

The Court: Let him answer again.

A. I did not know Mr. Hutchens.

Q. (By Mr. Powers): In the operation, there, does the crane engineer take any part in that, to

(Testimony of Delwin Calavan.)

try to tell him how to get his load ready for unloading?      A. No, he does not.

Q. That is solely up to the driver. Is that correct?      A. That's correct.

Mr. Powers: I think that is all.

Mr. Sims: May I have the pictures marked at the time of pre-trial by the defendant?

Mr. Powers: While he is getting those marked, I will just ask you one or two other questions, then.

Q. There is some contention about a whistle, here. I think it has been completely covered. In the period of your experience, there, would it be safer to blow a whistle instead of making a visual inspection, looking with your eyes to see if things are clear?

A. In my experience with logging, the only time they use a whistle is the time when they cannot see the men. Out in the [161] woods, for instance, they use a whistle punk to blow a whistle, because the man on the yarder may be 1200 feet away from those men, and they have to have a whistle in order to know when to go and stop.

Q. Now, in your operation, there, where you require them to look and see the pond man is out of the way, do you feel that is less safe or safer than using a whistle?

A. I feel it is much safer than using a whistle.

Q. Oh, one other thing. In connection with the safety of the operation, there, is there anything about your crane line that is a safety factor as far as not requiring the man to go and unhook it?

(Testimony of Delwin Calavan.)

A. On our crane line, there, the hook—you know as they——

Mr. Sims: Just a minute. I don't know where this leads us, either. This isn't a claim of negligence or a claim of contributory negligence, and it doesn't go to any issue, here, as to the type of catch that was used. If it could be helpful in any way—it has not been gone into by any of us at any of our pre-trial conferences or in opening statements, so I don't see quite the purpose of it.

The Court: What do you claim for it, Mr. Powers?

Mr. Powers: I claim it goes to the safety of the operation. Well, in order to explain it I would have to say what the witness was going to say, and I had better not do that.

The Court: To what specification are you referring now? [162]

Mr. Powers: Well, there is this thing about it: The Court has in mind intermingling, and we have showed the testimony shows that the driver is the one that makes all the arrangements for getting a truck ready to be unloaded. Now, I was just going to carry through and develop the point that after the log is off they have a safety device there that I think the cable disconnects itself automatically some way, so never is any employee of C. D. Johnson down around this operation. I just want to cover that.

The Court: Objection overruled.



(Testimony of Delwin Calavan.)

Q. (By Mr. Powers): Is that the fact, the way I have stated it?

A. That is the fact. The crane operator unhooks from the trailer after he sets it on the truck with the boom of the truck, and no one gets out of the cab of the truck at all to unhook the rigging.

Q. So the truck driver is on one level and working down there alone throughout the operation, and the crane operator is up on his donkey where he stays?

A. Yes, he is sitting in the seat of the donkey.  
Mr. Powers: I think that is all.

### Cross-Examination

By Mr. Sims:

Q. As I understand it, Mr. Calavan, the C. D. Johnson Lumber Company has nothing whatsoever to do with what the truck drivers are to do. Is that what you are saying? [163]

A. I claim, or I say, that the truck driver takes care of his own equipment, which is the truck and the binder chains and the bunk blocks.

Q. The C. D. Johnson Lumber Company tells him what he must do about the binder chains and bunk chains and all that? A. They do not.

Q. They don't do anything at all about that?

A. We have a safety poster posted at the end of the ramp where they drive in.

Q. As a matter of fact, there is actually posted over the signature of C. D. Johnson Lumber Company a sign ordering the truck drivers with refer-

(Testimony of Delwin Calavan.)

ence to the bunk chains. That's right, isn't it?

A. That's right. That is the safety rules. It is in the Code.

Q. And you have that sign up, don't you?

A. That's correct.

Q. Over the signature of the C. D. Johnson Lumber Company?      A. That's correct.

Q. Which says what they should do with the binder chains, with the releasing of the bunk chains, don't you?      A. That's correct.

Q. I am handing you, through the courtesy of the bailiff, three pictures. I direct your attention to the first picture, and ask you if that is the poster that you are testifying about?

A. No. 1 is the poster. [164]

Mr. Sims: I offer that picture in evidence.

Mr. Powers: No objection.

The Court: Is this the first picture?

Mr. Sims: This is picture No. 1 on the sheet of pictures.

The Court: Are you offering pictures Nos. 1, 2, and 3 on page No. 1?

Mr. Sims: Just the top picture; that's right.

The Court: That first picture will be cut off the other two.

Mr. Powers: I will offer the other two.

The Court: Have you any objection to the introduction of the other two?

Mr. Sims: No, I have not. If counsel wants all these pictures in for the convenience of all of us I have no objection to that, but I didn't want to

(Testimony of Delwin Calavan.)

take the time of the Court to attract any attention except to this one picture, but if counsel wants them all to go in together I think that would be convenient.

Mr. Powers: I offer 2 and 3.

Mr. Sims: How about the whole group?

Mr. Powers: If you want to. If he wants to put all the——

The Court: Do you intend to offer any of the other pictures?

Mr. Powers: I hadn't, because the large pictures are the same. The only reason I suggest as to 2 and 3 is that they wouldn't have to be cut off.

The Court: That is a pretty simple job, unless you have [165] some real objection.

Mr. Powers: I have no objection. Offer them all. Get them all in the record.

The Court: All right. All of the pictures—any writings on them? If there happens to be any writing on there, it might be scratched out. What are they marked?

Mr. Sims: Defendant's No. 6.

The Court: This group of pictures will be known as Defendant's 6.

(The paper, on which are mounted three photographs, so offered and received, was thereupon designated Defendant's Exhibit 6.)

Mr. Powers: Could the jury be looking at them while we go ahead with the witness?

(Testimony of Delwin Calavan.)

Mr. Sims: No. We can wait until the time of argument.

Mr. Powers: Well, they have to know what we are talking about.

The Court: Well, if Mr. Powers wants them handed to the jury they will be handed to the jury.

Mr. Sims: Yes, that's right.

May I suggest this: I am calling the jury's attention particularly to the one the witness is now talking about.

Q. Who is expected to enforce this rule on behalf of C. D. Johnson Lumber Company?

A. That rule is put there to try to make the truck drivers [166] obey the Safety Code.

Q. All right. And who is it of your organization that is expected to see to it that the law is complied with?

A. I suppose I am.

Q. And who is the man in charge of the actual unloading, itself—that is, the application of the power, itself?

A. Mr. Neal.

Q. That is your unloading engineer?

A. That's right.

Q. And being there seated, as he is, does he have a full, unobstructed view of this brow log and the log and the truck and his crane?

A. He has a complete view of the truck, not of the brow log when the load is in front of him.

Q. When the load is in front of him, that obscures the brow log, of course?

A. That's correct.

Q. If a man was standing on the dock in the

(Testimony of Delwin Calavan.)

area of the log and on the side that the crane operator is on, he could be readily observed by no more effort than just rolling your eyes and looking in that direction, couldn't he?

A. You mean by that a load of logs on the truck?

Q. That's right.                   A. Yes.

Q. Do I understand you correctly, Mr. Calavan, to say that [167] after you have looked and apparently everybody is in the clear on the water and on the dock, it would not be an additional safety to sound the whistle that you are going to unload?

A. As I stated before, I consider a whistle only for where you cannot see.

Q. But I am asking you, Mr. Calavan, a different question. Nobody is suggesting here that the engineer should be blindfolded and just give a whistle. That is unthinkable. We are saying to you, isn't it better, after you have looked and apparently everybody is in the clear at every possible place, to, in addition, blast this loud whistle that attracted you 300 yards away? Would it be an additional safety?

A. I have never saw it in any logging operation.

Q. I am asking you if it wouldn't be an additional safety.

A. I can't see where it would be any safer than a hand signal.

Q. Suppose there was somebody down on that dock that couldn't be seen readily.

A. There is supposed to be no one there.

(Testimony of Delwin Calavan.)

Q. All right. And suppose there is, however. Wouldn't blowing the whistle be an additional warning?

A. A whistle tends to startle more than it does to warn.

Q. Tends to what?

A. It tends to startle.

Q. Do you think it would be a good idea to startle somebody that might not be in the clear and might not be observed by the [168] unloading engineer?

Mr. Powers: Well, I object to this sort of argument. The law requires that no one shall be between the brow log and the load.

Mr. Sims: That is a matter of opinion.

Mr. Powers: It is not opinion. The law says no one shall be between the brow log and load.

The Court: The jury will disregard the remarks of counsel, but I think, Mr. Sims, what counsel is objecting to is your engaging in an argument with this witness. Ask him questions, but don't argue.

Mr. Sims: All right.

Q. Mr. Calavan, would it not be an additional protection to those who might be in that immediate area and who might sustain injury by the unloading operation—be an additional protection to avoid their injury, if, after a survey had been made by sight and apparently everybody was in the clear, a warning signal was given before the unloading?

A. My answer to that?

Q. Now, would you answer it, please, "Yes" or

(Testimony of Delwin Calavan.)

“No,” and then you go right ahead and say anything that you think might explain your answer.

A. “No” is the answer.

Q. All right. Now, you go right ahead.

A. And the reason for that is that hand signals are quite [169] customary on all these operations, and I would have already have installed such a system if I had thought it feasible. We have a whistle on the donkey, and hand signals are so much more practical, because at the time the man gives the hand signal he can be out where he can see onto the water.

Q. You think, then, it would be a definite detriment to sound an audible whistle or blast of some kind in addition to this hand signal? We all want that, you understand. We are just talking about something in addition to the looking.

Mr. Powers: He told you he thought it wouldn't help about three times.

A. My answer was “No.”

Q. (By Mr. Sims): Your answer is “No,” that it would be an unsafe practice?

A. It wouldn't be an unsafe practice, but I do not believe it is necessary, and it is impracticable.

Q. Use too much power, too much steam?

Mr. Powers: This is just argument.

Mr. Sims: Oh, no.

The Court: He can ask why it is impractical.

Q. (By Mr. Sims): Why?

A. Because, if a truck driver were to give a signal of that kind, he would have to go over to the

(Testimony of Delwin Calavan.)

water and then walk back and give the signal, because you couldn't have it over on the water side. [170]

Q. I am not talking about the truck driver. I am talking about a blast of the whistle. I guess I don't make myself clear. I mean this: Let us assume that a truck driver or your boom foreman, as in this case, walked over and looked at the water, and it was clear, apparently absolutely clear. Actually, there was a man under the dock in this water—high tide—and he is in there where Vincent can't see him, or he can't be seen, and so he signals everybody is in the clear, and the truck driver is in the clear. Now, I am asking you, why wouldn't it be a safe practice to give this whistle blast which would warn the man that could not have been seen after the hand signal was given?

Mr. Powers: Well, object to that.

The Court: Objection sustained. You have a number of facts, there, that have no relevancy to this case at all.

Mr. Sims: That is true.

Q. What is the extent of this operation? About how many employees are around there?

A. Well——

Mr. Powers: That has no relevancy, either. It is only the ones concerned with this operation here. It has no bearing on this case whatsoever.

The Court: Objection sustained. If you want to talk about this immediate dock, that is perfectly



(Testimony of Delwin Calavan.)

satisfactory, but how many employees in the mill—— [171]

Q. (By Mr. Sims): How many employees are there around the dock?

A. As a general rule, there are five.

Q. And who are they?

A. Mr. Neal, Mr. Vincent——

Q. Now, their duties; I don't care about their names. Mr. Vincent is the boom foreman; Mr. Neal is the unloading engineer. Now, go ahead.

A. Mr. Neal is unloading engineer and Mr. Vincent is in charge of the boom crew, and then there at that time there was Mr. Spoor, who was on the boom, and Mr. Clayton.

Q. They are all where?

A. They are all on the water.

Q. So on the dock would be just the two employees, Vincent——

A. There is only one, and that is Mr. Neal.

Q. Then unloading is not normally undertaken upon the signal of Mr. Vincent, as it was here?

Mr. Powers: I will object to the "unloading." That is misleading because Mr. Vincent very definitely said he gave the signal the water was clear.

Mr. Sims: Mr. Neal has testified he unloaded on the signal of Mr. Vincent, and I am asking if that is the normal operation there.

A. No one gives the signal to unload except the truck driver.

Q. Well, in this case, the testimony is that after

(Testimony of Delwin Calavan.)

the truck driver had given a signal to your unloading engineer, Mr. Neal, [172] Mr. Vincent went over the dock, a distance of 14 feet, and he came back part way, and then he signaled, and then he unloaded. I am asking you if that is the usual and normal functioning at that dock?

A. It is not.

Q. And you did not observe this particular unloading, I believe you said?

A. That's correct.

Q. How many binder chains did Dean Hutchens have in that truck ordinarily?

A. There should have been three.

Q. I mean, actually how many did he actually have ordinarily?

A. I do not know, because I didn't check the truck.

Q. You don't know whether, upon this particular occasion, then, he did have three binder chains?

A. I have no way of knowing.

Q. You only know that after this accident occurred there were only two binder chains there?

A. I do not know that. I know that there were at least two.

Q. Well, might you have miscounted and maybe there were three or four?

A. There could have been five. After all, there was a pile of chain in the jockey box, and there was the binders.

Q. You said two. Now, do you mean to say two or five?

(Testimony of Delwin Calavan.)

A. I said two. I could see two. [173]

Q. Where would the binder chain—what would have happened to the binder chain on that trailer if it had been untied at both sides, but was lying on the log? Where would it have gone?

Mr. Powers: There is no evidence that is the case here.

Mr. Sims: I am asking the question.

Mr. Powers: I know, but it has no relevancy. Mr. Neal said there was no binder chain there at the time.

The Court: You didn't have any evidence whatsoever about the binder chains.

Mr. Sims: This man is an expert, testifying as an expert, and I think we have the right to develop where a binder chain would go if it had been untied on a one-log load on both sides, where it would go, what would happen to it.

The Court: Objection sustained.

Q. (By Mr. Sims): You do not know, then, of your own knowledge whether there was or was not a binder chain on that trailer on that one log that came in there, Dean Hutchens' load?

A. No, I do not know.

Q. Who is in charge of that operation, there, in general—C. D. Johnson Lumber Company?

A. C. D. Johnson Lumber Corporation.

Q. I am talking about the defendant corporation. That is the defendant, here.

A. Mr. Dean Johnson. [174]

Q. He is the President of the Company?

(Testimony of Delwin Calavan.)

A. He is.

Q. And is general superintendent?

A. No, he is not the general superintendent.

Q. Who is the superintendent?

A. Of the logging department, Mr. C. C. Jacoby is logging manager.

Q. Were they there that day?

A. Not at the accident, no.

Q. They were not on the premises that day?

The Court: I don't see the purpose of that.

Mr. Sims: Very well. I think that is all.

Mr. Powers: That is all.

(Witness excused.) [175]

Mr. Powers: We will call Mr. Jacoby.

### CARL C. JACOBY

was thereupon produced as a witness in behalf of the defendant, and, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Powers:

Q. Where do you live, Mr. Jacoby?

A. Toledo; Toledo, Oregon.

Q. And you are employed by the C. D. Johnson Lumber Corporation?      A. That's right.

Q. And what is your work there, please?

A. I am logging manager for C. D. Johnson.

Q. And have been with C. D. Johnson for some time?

(Testimony of Carl C. Jacoby.)

A. It will be twenty-two years next February.

Q. And you are familiar with the operations of hauling and dumping logs, are you?

A. Very much.

Q. Now, did you have anything to do with making arrangements for having the logs delivered that are involved in this transaction?

A. I had to do with entering into a contract with a man by the name of Francis to cut, log, and deliver a certain amount of stumpage delivered in Toledo in the water.

Mr. Sims: That is a conclusion, and I move it be stricken.

The Court: I think that is just [176] background.

Mr. Sims: Just preliminary. Fine.

The Court: Objection overruled.

Q. (By Mr. Powers): And in connection with the cutting and delivery of the logs, where were they to be delivered?

A. They were to be delivered in sticks, boom sticks, in the water at Toledo opposite the mill.

Mr. Sims: I move that that be stricken.

The Court: I don't see the relevancy, but I am going to overrule the objection.

Q. (By Mr. Powers): And the compensation to be paid for the delivery of these was what—so much a thousand?

A. The compensation was so much a thousand net water scale delivered in sticks in Toledo.

Mr. Sims: Objection.

(Testimony of Carl C. Jacoby.)

The Court: Objection overruled.

Q. (By Mr. Powers): And how was it contemplated the logs would be put in sticks? Where would that ordinarily be done?

A. Well, the original contract was drawn with Francis. It was entirely up to Francis how he would do it.

The Court: I will sustain the objection to that. I think we are getting far afield, Mr. Powers.

Mr. Powers: Well, I am getting at who was in charge of this operation, and I would like to pursue it for that reason.

The Court: You mean who was in charge of the operation by which the logs were delivered to the C. D. Johnson mill? [177]

Mr. Powers: Into the water, yes. Whose responsibility it was to put the log into the water and who paid for it.

Mr. Sims: Well, of course, if the Court please, at the pre-trial conference it was contemplated in the order, I believe—and it will do no violence to the facts to suggest this—that they have their records to show that a charge was made by the defendant company to Mr. Francis, but I feel that we are going out then into another matter which is of no particular consequence. However, I am perfectly willing to stipulate that it is a fact that the C. D. Johnson Lumber Company did, in truth and in fact, unload and charge Francis for the unloading. If that will facilitate matters.

(Testimony of Carl C. Jacoby.)

Mr. Powers: That is all prejudicial talk before the jury, what he is saying.

The Court: The jury is instructed to disregard the remarks of counsel.

Mr. Powers, I have ruled previously that it didn't make any difference what the relationship was as long as he was on there lawfully.

Mr. Powers: Yes. Well, I am familiar with your Honor's ruling. This goes to who was in charge of the particular unloading of that truck.

Mr. Babcock: If the Court please, may I suggest in this connection that what may have been contemplated at one time or changes made are not material. The only materiality would [178] be how the logs were delivered and how they were unloaded.

The Court: That is the particular advice of your question and the answer of the witness. What may have been the contractual arrangement may not have been the actual practice then.

Q. (By Mr. Powers): I will ask you this, then, Mr. Jacoby: Did you or anyone for the C. D. Johnson Lumber Corporation give any directions as to the details, as to the manner of doing the logging, the manner of hauling the logs in or the manner of fastening their chains, or was that up to the logger?

A. It is entirely up to the logger. As a matter of fact, our man Francis is an independent contractor. He undertakes a job to deliver logs, and who he hires or how he goes about it—just so he goes about it in a reasonable manner is all we are concerned with.

(Testimony of Carl C. Jacoby.)

Q. Your concern is that the logs are delivered?

A. That is it. We have nothing to say about who he hires or anything about it.

Q. Well, now, when the logs were delivered, such as the one delivered by the deceased, whose duty was it to get the log ready for unloading?

A. Oh, in the method that is used down there, the truck driver. He is responsible for his truck, for his load, when he comes in there. We hope that he takes care of himself, takes care of his equipment. He removes the binder chains. There is a certain procedure that they all go through, and it is up to him [179] entirely to look after the unloading.

Q. And who gives the signal to unload?

A. When he has his truck all ready to unload with the binder chains off and his bunk blocks knocked loose, then he is supposed to walk around to either end of his truck—he can walk to either end—and look over into the water and see if everything is all right, and then he turns and gives the signal, hand signal, to the operator, the crane operator.

Q. While that work is being done by the truck driver, does the crane operator leave his position, or does he stay right with the crane?

A. Stays right in his seat where he belongs.

Q. And they are actually working on different elevations, are they not?

A. That's right.

Q. Are they intermingling with each other?

A. No, they are not.



(Testimony of Carl C. Jacoby.)

Mr. Babcock: The same objection, your Honor, that it calls for a conclusion and opinion. I think the facts speak for themselves.

The Court: Objection sustained.

Q. (By Mr. Powers): Now, in your long experience with logs, can you say or can you state to the jury whether it is a safe operation for the truck driver to give that signal to unload as it would be for anybody else to give it, or what is your [180] opinion?

A. I think our method is about the safest you can have.

Q. And now Mr. Neal has worked down there for you for a long time?

A. Mr. Neal went to work on that job, I believe, either '38—1938—and has been there ever since.

Q. And can you tell the jury whether you found him to be familiar with the signal that would say to unload, to go ahead and unload?

A. He has been a satisfactory employee for twelve years on that job.

Q. How do you feel about the visual signal, giving the signal by hand and actually looking to see that it is clear instead of giving a signal by whistle?

Mr. Babcock: Object to the form of the question because it assumes facts not in evidence. We are not suggesting that it be alternative, but in addition.

The Court: And how he feels about it would be of no consequence.

Mr. Powers: I think he is about as much of an

(Testimony of Carl C. Jacoby.)

expert as you have had here. He has been in the business for 22 years.

The Court: Mr. Powers, you know how to ask a question. Ask it right.

Q. (By Mr. Powers): Well, in your experience, do you see any safety factor in having a whistle in addition to the visual hand [181] signal?

A. The whistle wouldn't be any help at all. As a matter of fact, it would be worse, be a detriment. When a man gives a signal with his hand he sees what he wants to signal about, and if, in his judgment, everyone is in the clear, that is a highball (demonstrating). Go ahead.

Q. Let me ask you, what is the rule with respect to a truck driver going between the load on the truck and the brow log?

A. Well, if he ever does it it is one of the foolishhest things he can do.

Q. Is it forbidden by the Safety Logging Code?

A. Oh, I can't answer that, frankly. By common sense it is forbidden, yes.

Mr. Sims: I move that be stricken. It is argumentative.

The Court: The remark of the witness will be stricken.

Mr. Powers: We will offer in evidence the contract between Johnson and Francis——

Mr. Sims: Objected to.

Mr. Powers: ——which is Exhibit No.—I have forgotten which number you stated yesterday. It is probably No. 1 or No. 2.

(Testimony of Carl C. Jacoby.)

The Court: I think there is evidence here, Mr. Powers, that at the time of the accident they were not operating under this contract.

Mr. Sims: There was a modification. [182]

Mr. Powers: I haven't heard of it.

Mr. Sims: There is a modification testified to on the present state of the record.

Mr. Powers: No; you objected to what he was going to claim about the modification.

The Court: No, he didn't. Objection sustained.

Q. (By Mr. Powers): Were these logs being delivered under a contract? A. Yes.

Q. Between C. D. Johnson and Francis?

A. Yes, sir; the same contract still exists.

Mr. Powers: We offer the contract.

The Court: Has that contract been modified, Mr. Jacoby?

A. No, that contract is just as it was written, and it is still in effect. He has another year to go.

Mr. Sims: Well, may I ask one or two questions?

We were told yesterday by someone that you had abandoned the contract requiring delivery at the water; that it had been changed to somewhere else, and they were being delivered at Toledo.

The Witness: That doesn't change the contract. He still must deliver them at Toledo.

Mr. Sims: I am asking you, was that the original plan, and then was there a change? You can say "Yes" or "No," and then go right ahead. [183]

The Witness: Well, ask me again, please.

(Testimony of Carl C. Jacoby.)

Mr. Sims: Well, the question is, the contract you have referred to with Francis was for delivery at another point and another place and a different operation. That was down at where?

The Witness: That isn't—

Mr. Sims: Where was the place?

Mr. Powers: Well, let him answer the question. He asks one, and before the witness can answer he begins to ask another one.

The Court: Ask him the question, now, Mr. Sims.

Mr. Sims: I want to know if your original plan was different than the one that brought your logs in to your landing, your dock, at Toledo.

A. Just as the contract states.

Mr. Sims: Well, now, tell us.

A. If I get what you mean, I would say this: That when the contract was written Francis had the job of delivering logs in Toledo. Now, he had the option of doing any way he wanted to. He could unload the logs in Newport over a private dump that is owned by Sergeant Brothers, and then have them rafted and towed to Toledo. Now, we have nothing to do with that. Also, we operate our own dump at Toledo, which would require Francis to haul his logs by truck an additional eight and one-half miles and put them over our dump, which he finally elected to do. [184]

Mr. Sims: That is what I was going to say.

A. He elected to do that, but there is no modification of the contract.

(Testimony of Carl C. Jacoby.)

Mr. Sims: And that is what he did?

A. That's right. He did both ways.

Mr. Powers: He did both ways?

A. He did, yes.

Mr. Sims: At this particular time they were coming into Toledo?

A. That's right.

Mr. Sims: And you charged him—I mean C. D. Johnson Lumber Company actually charged him—for the unloading of these logs?

A. That is, he paid his proportionate share, yes.

Mr. Sims: You took it out of his money?

A. That's right.

Mr. Powers: Is that all, Mr. Sims?

Mr. Sims: That is all.

Q. (By Mr. Powers): Now, I think we could show what is this proportionate share. Where did that go? What was that for? A. For years.

Q. What did he pay for—the proportion?

A. That proportionate share meant that he was charged with the labor cost of operating that unloading rig, one man's pay.

Q. And that would be Mr. Neal in this case?

A. That would be Mr. Neal and the other man on the other shift. [185] It is run on a two-shift basis.

Q. So actually Francis or Hutchens—it was charged against Francis, here, was it?

A. Absolutely.

Q. That proportionate share would be to pay

(Testimony of Carl C. Jacoby.)

Neal's wages up there while he was doing the work there and unloading the logs?

A. That's right.

Q. Now, in your contract did you have an agreement that the logger would obey all the laws relating to logging and the rules for logging?

A. Right.

Mr. Babcock: Just a moment. I want to object because the contract is the best evidence, and on the further ground that it is irrelevant and immaterial to this case.

The Court: Are you still objecting to the contract?

Mr. Sims: No; he qualified it.

The Court: All right. Are you reoffering the contract now?

Mr. Powers: Yes.

The Court: It will be admitted.

(The document, so offered, being contract between C. D. Johnson Lumber Company and William R. Francis, dated April 18, 1949, was thereupon designated Defendant's Exhibit 1.)

Mr. Powers: And we waive reading part of it. I should like to call the jury's attention to part of it. [186]

Mr. Sims: We are willing to waive the rule that he read it in its entirety. It is perfectly agreeable that he read it at the time of argument to shorten the trial.

Mr. Powers: Well, I can summarize it. That is what I was going to do. I can summarize it.

(Testimony of Carl C. Jacoby.)

The Court: You are either going to read it in its entirety—

Mr. Powers: That is what I would like to do now. I would like to read portions of it.

Mr. Sims: No. If it is to be read I want it all read. You can't piecemeal it. If he wants it read he should read it in its entirety.

Mr. Powers: Oh, there is nothing to that.

The Court: I don't think I am going to require him to read the whole thing.

Mr. Powers: This is a logging contract dated April 18, 1949, between C. D. Johnson Lumber Company, a corporation, and William R. Francis, designated as "Logger," and it provides for logging over a certain area. "As compensation"—this is Paragraph VI—"for said logging and removing of timber from said land, owner shall pay the logger the sum of \$15.00 per thousand board feet net water scale."

Q. What does that "net water scale" mean?

A. Net scale means commercial scale, what logs are bought and sold on in the water.

Q. In the water. And that is for old growth and yellow fir [187] and logs delivered in sticks by the logger at Toledo, Oregon. What does that delivering in sticks mean?

A. That means delivering in boom sticks. Boom sticks are for making the rafts.

Q. "Such payments shall constitute full compensation for all services and claims by Logger under this contract, including transportation taxes

(Testimony of Carl C. Jacoby.)

and taxes provided for by State Forest Research and Experimental Tax Act (timber severance taxes). Payments hereunder shall be made by Owner at its office in Toledo, Oregon, on or before the 10th day of each month following the month in which logs are delivered. Logger may draw, on the 15th day of each month, such sum as shall be reasonable, not exceeding such sum as may be equivalent to the compensation then due Logger.”

Then, skipping—this is (7): “Logger shall conduct logging operations hereunder in a businesslike and efficient manner, in accordance with modern and approved logging methods, and shall keep and observe all state and Federal laws, rules and regulations now or hereafter applicable thereto and to employment of labor thereunder. Logger shall fall, buck and remove \* \* \*” and so on.

Then a provision for branding logs.

And this is the contract you were operating under at that time?      A. That’s right. [188]

Q. Did you have any other dealings with Dean Hutchens or were they all between Dean Hutchens and Francis?

A. I never had seen, didn’t know who he was, had nothing to do with him in any way.

Q. He was not an employee of C. D. Johnson?

A. Not at all.

Mr. Powers: I believe you can take the witness.



(Testimony of Carl C. Jacoby.)

Cross-Examination

By Mr. Sims:

Q. Mr. Jacoby, would you refer to the records of the Company which Mr. Powers has brought here, which have to do with this contract, and point out what the charges were. I don't know what Mr. Powers has there.

Mr. Powers: I think I can get it for him.

Mr. Sims: Very well. I wonder if you would take No. 2 from the envelope.

Mr. Powers: It is marked No. 3.

Q. (By Mr. Sims): As counsel reads that, I would like to review the question.

It is simply to review the records counsel is handling and I will ask you if that is the method of charging Francis for the use of your facilities, your crew, and all that at the unloading dump. Now, if I can see that through your eyes, Mr. Jacoby—will you just tell me what it is you are looking at as to the charge and amount? [189]

A. Well, this is a copy, a carbon copy, of the voucher check issued.

Q. What does that show, please?

A. It shows what he was to receive. It shows his scale for the month of old growth.

Q. What was his scale? In other words, how much stuff did he deliver there at your dock and how much did you hold out for this unloading?

A. It shows he put in 97,738 feet of old growth at \$25.00, 449,493 second growth, and other species.

(Testimony of Carl C. Jacoby.)

at \$21.00. This sheet doesn't—yes, it shows here “less dumping of logs, \$57.46.”

Q. All right. Now, the \$57.46 that he was charged would take care of how many days' operation?

A. For the whole amount of footage that was put in.

Q. It depended on footage?

A. That's right.

Q. And he was charged, then, at what rate per thousand?

A. The rate varies. It is his proportionate share.

Q. Give us the way it would vary. About how much would it run?

A. Here is the way it is figured. We have about, oh, they run from five to twenty different operators putting in logs on this log dump. Now, we don't intend—we have no fixed rate. All we want the loggers to do is pay for the labor cost of that dump, the operator alone, so that some months there is 5,000,000 feet put in. It runs as low—that would mean about [190] an average of 8 cents a thousand. Some months it runs—when there is only 2½ million put in, it is doubled, so it will run anywhere from as low as a thousand—it is a non-profit setup, anyhow, and it may run from 6 cents up to 30.

Q. And so there was no record made as to any particular truck or any particular operation? In other words, you average it all out. If your facilities, there, took care of a lot of logs, the rate per thousand would be less?

(Testimony of Carl C. Jacoby.)

A. That's right. The record is kept, though, specifically on each operator. We know what each operator puts in, so we charge him. We find out what the average cost is, and then we multiply it by his total output, and that is his charge.

Q. That's right. And so there is no special charge for any particular truck?

A. Not necessarily, no.

Q. Well, just absolutely not. It is the operator. In other words, when Dean Hutchens came in there, Dean Hutchens didn't pay you anything?

A. He did not, no.

Q. There was no deal? In other words, what I am getting at is you didn't—

A. We didn't know Dean Hutchens.

Q. You didn't know him at all; you weren't working for him; you weren't working under his direction at any time?

A. No. [191]

Q. When he came on your property he came on there bringing in your logs through this arrangement with Francis?

A. Yes, it was our stumpage.

Q. It was your stumpage that Francis was bringing in there?

A. That's right.

Q. And so when Dean Hutchens came in he was subject, then, to the use of your facilities and your employees in this unloading operation. Is that correct?

Mr. Powers: Well now—

A. He came in here, as far as I know, on his own.

(Testimony of Carl C. Jacoby.)

Q. (By Mr. Sims): At least, he was there with your logs?

A. They weren't our logs then. No, they were still Francis' logs.

Q. They were your logs when they got in the water? A. As soon as we scaled it, yes.

Q. Whom did Calavan take orders from?

A. Oh, he worked directly under me.

Q. In other words, he took orders alone from the defendant, the defendant corporation, the defendant Johnson Lumber Corporation?

A. He would take them under me, yes.

Q. What I am getting at is, he wasn't taking any orders from Dean Hutchens?

A. I wouldn't think so.

Q. Well, you know he wouldn't?

A. Well, I wouldn't think so. [192]

Q. That is right, isn't it? One answer, Mr. Jacoby, that I didn't quite understand, after there has been a hand signal to unload, why would it be worse, if, after there had been a hand signal to unload and everybody was in the clear, for there to be an audible whistle, then, "We are going to unload," by the engineer?

A. You say why would it be worse?

Q. Why would it be worse?

A. Oh, it wouldn't do any particular good.

Q. Well, would it be worse? Did you really mean that?

A. Yes. I don't think there is anything better

(Testimony of Carl C. Jacoby.)

than a hand signal given by a man who is seeing what he is doing.

Q. All right. But after you have actually seen the hand signal, could it have done any harm to have followed the hand signal by a whistle?

A. If this man giving the signal could do it himself, yes, but not to depend on someone else to do it.

Q. In other words, you feel it would have been a safer operation if the man giving the hand signal also gave a whistle signal? Am I right?

Mr. Powers: We object to that.

A. I don't say that.

Q. (By Mr. Sims): I am asking you——

Mr. Powers: We object. That is not in the case whatsoever.

Mr. Sims: He is an expert. It is in the [193] case.

Mr. Powers: There is no issue on that.

Mr. Sims: Insufficient employees.

The Court: You are asking this witness if the truck driver should also give the whistle signal in addition?

Mr. Sims: I am not saying the truck driver. I am saying the man giving the hand signal. If the man giving the hand signal also had a whistle, might it be better?

The Witness: I didn't say that.

Mr. Sims: Apparently I was misunderstood.

The Court: Will you please ask your question over, and I want to caution you again, please,

(Testimony of Carl C. Jacoby.)

don't argue with the witness. Ask him a question.

Q. (By Mr. Sims): Mr. Jacoby, my question is, if there is a man on the dock—I don't care whether you are going to call him a truck driver, a safety engineer, or another employee—that has the responsibility of observing that the men on the water are clear, that the men on the dock in the immediate area involved are clear, if, after he gives the hand signal, he also gave a whistle signal, wouldn't that be an added safety?

A. No, I don't think so.

Q. You don't think it would add?

A. No, I do not.

Q. Do you think it would make the operation more dangerous?

Mr. Powers: I don't think that enters into it, whether it makes it more dangerous or not. [194]

Mr. Sims: Well, that is what he testified to.

The Court: Are you through with this witness, Mr. Sims?

Mr. Sims: I think so, your Honor.

Mr. Powers: That is all.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Powers: Defendant rests.

Oh, there was one thing before I rest. I want to offer in evidence that ruling from the Industrial State Accident Commission.

Mr. Babcock: To which we will object, your

Honor, and if there is going to be argument——

The Court: Objection sustained.

Mr. Powers: I see.

The Court: Now, you are resting subject to your right to make an offer of proof on Mr. Calavan, or in view of Mr. Jacoby's testimony?

Mr. Powers: Well, I think what I could do now before I rest is also offer the other exhibits which were the records of Francis which were marked the other day showing his pay roll and——

Mr. Sims: Oh, I object to that.

The Court: Objection sustained.

Mr. Powers: That would be for purposes of establishing the [195] status of the decedent.

The Court: That's right. You may have an exception.

Do I understand you now that you have abandoned your request to make an offer of proof?

Mr. Powers: No, I think your Honor let the testimony in. We were talking about the contract, and Mr. Sims went into the contract so much that the first thing you know it was in.

Mr. Sims: We withdrew and put it in, but I didn't know that was what——

Mr Powers: I think that what the offer of proof was was testified to.

The Court: I don't ask you to put in any more testimony, Mr. Powers. I just asked if you wanted to put it in.

Mr. Powers: I wanted to put in all the exhibits, and I mentioned them one by one, and I assume I have an exception to the ones not admitted?

The Court: You have.

Mr. Sims, have you a rebuttal witness?

Mr. Sims: We may have. I would like a few moments.

The Court: The reason I am suggesting this is that if it is not going to be too long we may take our recess all at one time.

Mr. Sims: Fine; if we can accommodate all.

The Court: Well, are you going to find that out?

Mr. Sims: I will resolve it right away. [196]

The plaintiff will offer no rebuttal.

The Court: Ladies and gentlemen of the jury, we will take a recess for about fifteen minutes.

(Thereupon the jury withdrew from the courtroom, and the following occurred without the presence of the jury:)

The Court: In view of the fact that I have just gotten some additional instructions, Mr. Powers, it is very difficult for me to comply with the rule which I usually comply with, and that is to tell you what I am going to instruct before the arguments. I think, however, from the rulings I have made it is fairly clear to you how I am going to instruct, but I am not in a position to set out with particularity at this time which instructions I will give either in the form submitted or in a modified form, and which of those I am going to reject. However, if you desire, I will generally set forth some of the things which I think that I am going to instruct.

In the first place, I would like to ask counsel for plaintiff some questions. Are you contending that



the plaintiff's decedent was subject to the Act as a matter of law or do you concede that that is a question to be decided by the jury?

Mr. Babcock: I think there is a mixed question there, your Honor. We will concede the question as to whether risk and danger was involved is a question for the jury.

The Court: You concede that? [197]

Mr. Babcock: Yes. However, we contend that the question of his status is a question of law, and whether under the status as shown he is one of the class of persons entitled to the protection of the Act in working in work involving risk and danger, as a matter of law, and I think it might be appropriate at this time to state for the record that we will withdraw our requested instructions No. 4 and No. 5 and No. 6.

Mr. Powers: I would like to state for the Court I intend to make a motion for a directed verdict. I assume from what you state that it will not be granted.

The Court: Well, go ahead. If you want to make it at this time, go ahead.

Mr. Powers: Yes.

Comes now the defendant C. D. Johnson Lumber Corporation and moves the Court for an order directing the jury to return a verdict in favor of this defendant on the grounds and for the reasons heretofore stated in our motion for a judgment of involuntary nonsuit, which, if the Court wishes me, I could have the reporter repeat at this time, or, if not, if the Court is familiar with them, I will

just refer to them and include them in this motion by reference.

The Court: You may include the whole thing by reference.

Mr. Powers: Thank you.

And in addition to that ground, on the further ground that it now appears after all the evidence is in and all parties [198] have rested, that the status of the decedent is purely speculative, here. There is no evidence that he was an employee of anyone, and there isn't sufficient evidence as to his being an independent contractor.

Now, this Act certainly applies to someone, and they have the burden of showing that status in order to bring him within the purview of the Act. It was one of the contentions that they made that he was an employee of Francis, and they apparently abandoned it. They offered no evidence of it.

On the other hand, the evidence we offered—that is, I am speaking about defendant C. D. Johnson Lumber Corporation—which would have shown that he was an independent contractor, was rejected by the Court, so now, as the matter stands, the man's status is static, which means nothing. Nobody knows what his status was, and certainly, under that situation, there would be no basis for allowing any recovery under the Employers' Liability Act.

Mr. Sims: There is a stipulation.

The Court: The motion is denied.

Mr. Powers: Exception allowed?

The Court: Exception allowed.

(After discussion between the Court and

counsel regarding various requested instructions, the jury re-entered the courtroom, and the following occurred within the presence of [199] the jury:)

The Court: We are now involved in a little argument, and we thought that it would be quite inconvenient for members of the jury if counsel would start to argue the case sometime this afternoon, because we want to leave by 5:00 o'clock, if possible, and therefore it has been suggested, and I acquiesce in the suggestion, that we come back at 9:30 tomorrow morning, and we will be through, we hope, with the arguments and the instructions by noon-time. Is that satisfactory with the members of the jury?

We will now adjourn until 9:30 tomorrow morning.

(Thereupon an adjournment was taken until tomorrow, Thursday, June 21, 1950, at 9:30 o'clock a.m.) [200]

Thursday. June 22. 1950

The trial was resumed, pursuant to adjournment, at 9:30 o'clock a.m., and the following further proceedings were had herein:

(At the close of the evidence and following argument by counsel to the jury in behalf of the respective parties, the Court charged the jury as follows:)

The Court: Ladies and gentlemen of the jury: You have heard all the evidence and the arguments

of the attorneys in the case of Kathleen Hutchens, plaintiff, vs. the C. D. Johnson Lumber Corporation, defendant, and it is now my privilege and duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that the Court is about to submit to you.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find from the evidence before you without any bias or prejudice or sympathy. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been told many times during your service as jurors that what an attorney says either in the course of a trial or in his argument to you or to the Court is not evidence. It is your duty to take the facts as you see them in the evidence and to draw whatever inferences or deductions that you believe [201] solve the questions of fact. A Judge of a Federal Court has the privilege of commenting upon the evidence. If I shall comment upon the evidence I will indicate it, and you are not bound by my opinion. If you know or think that you know by any expressions or words of mine what I think about this case and how it shall be determined, you are not bound by my opinion. You are the sole and exclusive judges of all questions of fact

and of the credibility of all witnesses; however, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not. Without any further introduction, then, I will proceed to the legal basis of this case.

Plaintiff Kathleen Hutchens alleged that her husband was killed on April 19, 1949, on the premises of the defendant, C. D. Johnson Lumber Corporation, at Toledo, Oregon, when he was struck by a log which was being unloaded from the truck which he was operating, and that her husband at the time he received his fatal injuries was engaged in work entitling him to the benefits and protection of the Employers' Liability Act of Oregon. The defendant, C. D. Johnson Lumber Corporation, admits that Dean Hutchens, husband of plaintiff, was killed on its premises in connection with the unloading of the truck he operated, but they deny that at the time he was injured he was entitled to the benefit and protection of the Employers' [202] Liability Act.

Defendant further denies that Dean Hutchens was killed as a result of any negligence on its part or any failure on its part to comply with the requirements of such Act. On the contrary, the defendant alleges that the fatal injuries sustained by Dean Hutchens were solely the result of his own negligence.

At the outset I want to call your attention to the fact that the defendant was not the insurer of the safety of the plaintiff's decedent, Dean Hutchens,

or any of its employees or any other persons using its facilities. Just because an accident happened does not mean that under the rules of law there is any liability on the defendant; in other words, the mere happening of an accident does not entitle the plaintiff in this case to be paid by the defendant even though her husband was killed as a result of such accident, and in sawmills and lumber camps there are such things as unavoidable accidents; that is, accidents which happen without the fault of anyone. If you determine that such is the case here your deliberations will be at an end and your verdict must be for the defendant even though a death resulted.

Legal liability is based upon a breach of duty; in other words, there must first be a duty incumbent upon the defendant. Second, there must be a breach of that duty. And, third, there must be injury or damage proximately resulting [203] from such breach of duty. Unless you find all three things there can be no legal liability.

As you know from your previous experience on this jury, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. However, the Oregon Employers' Liability Act, the law under which this action was brought, holds the defendant to a different and higher standard of conduct for the care and protection of persons entitled to its benefits, and

the failure of a defendant to comply with the requirements of such Act with respect to any person entitled to its protection is negligence per se, or, negligence as a matter of law, and this is true regardless of whether or not you think that a person of ordinary prudence would have been required to live up to the standards set forth in such Act.

The Oregon Employers' Liability Act requires—and I am reading now from the Act—"All owners, contractors, or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employees or to the public shall use every device, care and precaution which is practicable to be used for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or [204] device, without regard to the additional cost of suitable materials or safety appliances or devices."

Your first inquiry therefore will be whether the work of the plaintiff's decedent—that is Dean Hutchens—was engaged at the time of the fatal accident involved risk or danger. If you find from a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time and place of the fatal accident involved risk or danger, then he was entitled to the protection and benefits of the Oregon Employers' Liability Act; and if the defendant, C. D. Johnson Lumber Corporation, is subject to the Act, the duties imposed upon it are not delegable; in other words, the defendant is charged with the responsibility of seeing to it that

the requirements of the Act are adhered to and it may not pass on these obligations by contract or any other method.

Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger. [205]

I have used the words "risk or danger" several times, and I want to explain that in considering whether the work involved a risk or danger you should consider those words in their ordinary sense, and the question presented is whether the work being carried on at the particular time and place was inherently dangerous.

If the plaintiff failed to prove by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the accident, at the time and place of the accident, involved risk or danger, then your deliberations will be at an end and you will return a verdict for the defendant. On the other hand, if you find by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the fatal accident did



involve risk or danger then the defendant C. D. Johnson Lumber Corporation was subject to the Oregon Employers' Liability Act and was under a duty to observe and carry out its provisions.

Now, if you so find that it was under the act, your next inquiry will be: Did the defendant C. D. Johnson Lumber Corporation breach that duty?

The plaintiff in this case has the burden of proof to establish a breach of that duty because the law presumes that the defendant has performed all the duties incumbent upon it under the terms of the Employers' Liability Act. In order to recover plaintiff must establish by a preponderance of the [206] evidence that the defendant has not carried out the duties imposed upon it by the Act.

Preponderance of the evidence means the greater weight of the evidence. Now, the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give to the witnesses, or by reason of other evidence that may have been introduced. If you find upon any claim of evidence set forth by the plaintiff against the defendant that the evidence is evenly balanced or inclines towards the contention made by the defendant, then the plaintiff is not entitled to recover on that particular issue.

Now, the plaintiff was required to specify the manner in which she claims that the Act has been violated or in which the defendant breached its duty to Dean Hutchens, her husband. I instruct you that the plaintiff is bound by such allegations of negli-

gence charged against the defendant, which I will outline for you, and she must recover, if at all, in this action upon those allegations and no others. Or, if you should believe that the defendant was guilty of negligence or violated the provisions of the Employers' Liability Act in some particular not mentioned in my instructions, you cannot consider such other negligence or breach even if you find that it existed.

Now, the claims upon which plaintiff must recover, if at all, are the following: First, plaintiff charges that [207] defendant failed to have stationed at the loading dock an additional employee to assist the unloading engineer in the unloading of logs and to give signals for the unloading of logs and to perform the duty of making certain that all persons were in the clear before the load was discharged; second, the plaintiff charges that the defendant failed to require that all signals for the unloading of logs should come from a single designated person.

In considering these two specifications—and we will consider other specifications later—you will review the evidence which was submitted on this subject, and which evidence was in sharp conflict. As you will remember, some of the witnesses testified that it was practicable to have another employee who would give all of the signals, and other witnesses denied that such employee was neither necessary or practicable. It will be your duty to determine whether the failure of the defendant to maintain such an employee violated its duty under

the Act to use every device, care and precaution practicable to be used without impairing the efficiency of the operation, but I call your attention to the fact that there must be some reasonable relationship between the maintenance of an additional employee and greater safety.

As I previously stated, plaintiff has the burden of proof on each of these specifications and must prove by a preponderance of the evidence that it was the duty of the [208] defendant under the Act to provide and maintain such additional employee.

In its third specification the plaintiff charges that the defendant failed to make and enforce proper rules and regulations for the safe operation of the dump and conduct personal safety instructions for the employees engaged in the performance of the work at the dump.

You will recall the evidence which was submitted on this subject.

Likewise, there were only two men on the dock besides Dean Hutchens. They were Mr. Vincent, a foreman, and Mr. Neal, the unloading engineer. I leave it to you to determine whether these men were qualified by experience and training to supervise the activities under their direction and whether or not there were proper rules and regulations in effect at that time.

Plaintiff also alleges in its fourth specification that the defendant was negligent in causing the log to be unloaded from the truck without notice or warning to the decedent; and, fifth, it was negligent—that is, the defendant was negligent—in un-

loading said log without observing that the decedent was in the clear.

The evidence on these two specifications is likewise in sharp conflict. There was testimony that the signal which Hutchens gave was not a "go ahead" signal and that there was an interval of time between the giving of the signal by Hutchens [209] and the actual unloading of the log by Mr. Neal. There was also evidence that Mr. Hutchens gave a hand signal to go ahead, that he was in a place of safety at the time such signal was given, and that the unloading engineer proceeded to unload the log a few seconds later after he had obtained another signal from Mr. Vincent that the pond was clear.

You are to consider this evidence together with the other testimony that was introduced in this case and determine whether or not the plaintiff has sustained the burden of proof on these two specifications.

Plaintiff's last specification of negligence is that the defendant failed to provide the unloading machine with an audible warning device and that it failed to sound an audible warning before unloading the log. Here again there is a conflict in the evidence as to whether the sounding of a warning by whistle in addition to a hand signal was either practicable or necessary, and I leave it to you to determine whether the failure to provide a whistle, and the blowing thereof before the logs were unloaded, constituted a breach of defendant's duty under the Employers' Liability Act.

I want to repeat again that the plaintiff has the burden of proof by a preponderance of the evidence the specifications upon which it relies. However, it is not incumbent upon the plaintiff to prove more than one of these specifications. If she has proved that the defendant breached its duty with [210] regard to any one of the specifications by a preponderance of the evidence you will then go to the next point and determine whether or not such negligence so proved was the proximate cause of the injury and death of Dean Hutchens.

However, if you find that the plaintiff has failed to prove that the defendant has breached its duty with respect to any such specifications, your deliberations will be at an end and you will return a verdict in favor of the defendant; on the other hand, if you find that the plaintiff has by a preponderance of the evidence proved that the defendant has breached its duty in one or more of the respects above specified, you will consider whether or not such negligence was the proximate cause of the death of Dean Hutchens.

Now, proximate cause is probable cause. It is the dominant cause from which injury follows as a direct, immediate and natural consequence; therefore, if you find that the defendant was guilty of negligence that does not settle your problem unless you go further and find that the particular negligence was the proximate cause of the injury and death, that cause which actually produced the accident and death. To be the proximate cause of injury the act must have directly produced the injury and

it must have been the cause without which the accident and death would not have occurred.

If you find that Dean Hutchens himself did certain acts which were the sole cause of the accident, then you could [211] not find that any act of negligence on the part of the defendant was the proximate cause of the accident and death, even though you find that the defendant had been negligent. If, on the other hand, you find that any act of negligence on the part of the defendant was the proximate cause of the injury, then you will find for the plaintiff upon that issue and you will then take up the other questions which I will outline for you.

The defendant has alleged that Dean Hutchens was guilty of negligence and that his negligence was the sole and proximate cause of the accident and his death; that is, the C. D. Johnson Lumber Corporation alleges that this accident and the resultant death of Dean Hutchens was solely caused by his own negligence.

Now, in so far as the negligence of the plaintiff is concerned, it may be defined as follows: Negligence is the doing of an act which an ordinarily reasonable and prudent man would not have done under all of the circumstances, or the failure to do an act which an ordinarily reasonable and prudent man would have done under the same or similar circumstances.

The defendant has alleged that the plaintiff was guilty of negligence in certain particulars, and you may consider these particulars and no others. That

is the same thing that I instructed you with reference to the charges of negligence made by the plaintiff against defendant. You can consider only those specifications. And, likewise, in connection with the [212] specifications of negligence made by the C. D. Johnson Lumber Corporation against Dean Hutchens, you may consider only those specifications and no others, and if you should believe that Dean Hutchens was guilty of negligence in some other particular you may not consider such other negligence for any purpose whatsoever.

On these specifications of negligence made by the C. D. Johnson Lumber Corporation against Dean Hutchens, the defendant has the burden of proving one or more of them and must prove such specifications by a preponderance of the evidence. The defendant's specifications are as follows:

First, that Dean Hutchens failed to comply with the standing instructions of the defendant to all truck drivers to stand clear of the loading operation and in particular not to stand between the truck and the brow log; that Dean Hutchens failed to arrange to load his truck in such manner that the binders and bunk block chains could be released from the side of the truck opposite from which the logs will roll in unloading; three, in leaving a place of safety and placing himself in a perilous position, between the log being unloaded and the brow log, after having given the signal to the crane engineer to unload the log on his truck; and, fourth, in failing to take a safe position while the log was being unloaded

from his truck when there was a safe position open to him.

I don't think there is any question that Dean Hutchens [213] was between the truck and the brow log at the time of the accident, and that it was a dangerous place to be, not only dangerous for him but for any other person to stand between the brow log and the truck during the time that the unloading operations were in progress, and that is a matter of comment I make. However, you have heard all of the testimony and I am leaving it to you to determine whether under such testimony and the other evidence that was introduced whether or not Dean Hutchens was guilty of negligence in any particular specified by the defendant.

Of course, if you find that Dean Hutchens made his own working conditions and that the accident and injury resulted from such working conditions which he himself made, then the defendant is not responsible for such accident or injury and your verdict would be for the defendant.

Now, as I have stated before——

In connection with that instruction I want to say that the accident and injury would have to result solely from his own working conditions, and if Dean Hutchens was injured and killed partially as a result of the failure of the C. D. Johnson Lumber Company to comply with the terms of the Act and that such failure contributed to his accident, then that would not exonerate the lumber company, the defendant lumber company.

Now, as I have stated before, if you find that the



accident was solely caused by the negligence of Dean Hutchens [214] and there was no negligence on the part of the defendant, C. D. Johnson Lumber Corporation, which contributed to the accident and injury, your verdict must be for the defendant; however, under the Employers' Liability Act negligence on the part of the plaintiff which contributed to the accident and death can only be considered by you in the mitigation of damages.

I want to point out here that in consideration of the specifications of negligence made by the plaintiff against the defendant, and the specifications of negligence made by the defendant against Dean Hutchens, that each party had a right to assume that the other would observe the law and would exercise reasonable care, but no one had the right to proceed on that assumption if he knew, or in the exercise of reasonable care should have known, that the other was not using the care required of him or was not obeying the law in some other particular.

Now, ladies and gentlemen, if you have found that there is liability on the part of the defendant first because the Oregon Employers' Liability Act covers this case; second, because the defendant breached its duties under the Act; and, third, because such breach or breaches proximately caused the accident and death of Dean Hutchens, then you should determine what amount of damages the plaintiff should be awarded.

Damages, like any other proposition, must be proved by a preponderance of the evidence, and the plaintiff on that [215] issue has the burden of

proof. Now, the mere fact that I am instructing you on the subject of damages does not mean that I am of the opinion that the plaintiff is or is not entitled to recovery in this case. I am expressing no opinion on that subject one way or another.

In this type of case, assuming that the plaintiff is entitled to recover, it is the aim of the law to compensate plaintiff for any pecuniary loss that she has suffered by reason of her husband's death; however, if you find that there was contributory negligence on the part of Dean Hutchens and that such negligence contributed to his fatal injuries, then in such event the amount of damages which you may award plaintiff will be reduced in proportion to such negligence, if any, which you find Dean Hutchens was guilty of as compared to the negligence of the defendant.

By "pecuniary loss" we mean the loss having a financial advantage to the plaintiff which would include all prospective advantages of a pecuniary nature, if any, which were cut off by the death of Dean Hutchens. Pecuniary loss is not limited to the loss of financial contributions to the support of plaintiff but also includes the loss of other things which have pecuniary worth. In this connection you should take into account to the extent they have pecuniary value any loss of personal services Dean Hutchens would have performed for his wife, any loss of advice and counsel of the management of the [216] business affairs of the family which he would have rendered. You may not, however, include any compensation for mental anguish, suffer-

ing or bereavement, and you may not take into account the loss of society, companionship, comfort or protection, except in so far as they involve pecuniary loss.

You should consider the age, health and physical condition of Dean Hutchens prior to his death, his habits with respect to industry and his capacity to earn money, and the number of years that he normally would have been expected to live and earn money, his obligation to provide for the plaintiff, and his disposition to do so, and his disposition to render service for her, and from all of these circumstances determine what pecuniary loss, if any, the plaintiff has sustained by reason of Dean Hutchens' death.

After arriving at the amount of such pecuniary loss you will then determine whether the amount of damages to be awarded should be reduced because of any contributory negligence on the part of Dean Hutchens. If you find that Dean Hutchens was negligent in one or more of the respects charged and such negligence contributed to his death, then you will reduce the amount of damages which you have found in proportion to the negligence of the respective parties. For example, if you find that Dean Hutchens was contributorily negligent and that such negligence was responsible for 25 per cent of his fatal accident, then you would reduce the amount of damages by 25 [217] per cent and you would award plaintiff 75 per cent of the recovery which you would have ordinarily have given her had Dean Hutchens not been negligent in any par-

ticular. If Dean Hutchens' negligence contributed to the extent of 10 per cent the award should be reduced by that amount, and if he was guilty of negligence to the extent of 50 per cent then the award should be only one-half of that what would normally be given plaintiff had Dean Hutchens not been negligent.

The amount of damages you find which have or probably will be sustained by plaintiff after the reduction, if any, because of any contributory negligence on the part of Dean Hutchens, shall then be reduced to its present value and such amount will be the amount of your verdict in case you find that plaintiff is entitled to recover.

I think all of us know that money paid in installments over a period of years has a present cash value which is less than the total amount payable in installments over a period of years, and it would be your duty to determine what the present cash value of the pecuniary payments or the financial payments made to her and the other pecuniary loss suffered by plaintiff over a period of years.

At this time I want to call your attention again to the fact that you will not be called upon to determine damages until and unless you find the work which Dean Hutchens was performing at the time and place of the accident involved risk [218] or danger, and thus entitled to the protection and benefits of the Employers' Liability Act of Oregon. That the C. D. Johnson Lumber Corporation violated its duty to comply with such Act in one or more particulars, and that such violation was

the proximate cause of the accident and the resultant death of Dean Hutchens.

This case is not to be tried on the basis of any sympathy or passion or prejudice of any sort. You are to be guided solely by the evidence in this case and by the rules of law which I have laid down for you.

You are the sole and exclusive judges of the facts in the case and of the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary but must be exercised with legal discretion and in subordination of the rules of evidence. The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives or by contradictory evidence. If you find that a witness has falsely testified in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false it will be your duty to [219] entirely disregard all the evidence given by such witness unless corroborated by other evidence which you do believe.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself

if true conclusively establishes the fact. If a witness testifies to a transaction to which he has been a witness, that is direct evidence, and you have that kind of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another, and which though true does not in itself conclusively establish the fact but furnishes a presumption or inference of its existence. That evidence is also before you in the nature of pictures and other evidence. It is, however, indirect evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of eye-witnesses.

You should look with caution upon the oral admissions of the parties, as that kind of evidence is subject to mistake. The parties themselves may have been misinformed or may not have clearly understood its meaning or the witness may have misunderstood.

Are there any instructions of a statutory nature which I have omitted?

Mr. Sims: I think not. [220]

The Court: We will take a five-minute recess during which a legal matter will be discussed. Will the jury retire for a period of five minutes?

(At the conclusion of the charge, a recess was taken, and the following proceedings were had herein without the presence of the jury.)

The Court: Plaintiff will take exceptions first. Who is going to take the exceptions for the plaintiff?

I want to call your attention to the fact that under the rules you will have to set out particularly each instruction which the Court has failed to give if you want to take an exception. You can't take a blanket exception.

Mr. Sims: You can't take a blanket exception as to instructions requested and not given?

The Court: No. Do you want to take a couple of minutes?

Mr. Babcock: It might be helpful.

The Court: We will take a recess for a couple of minutes. Before we do, I want to ask one question: Mr. Powers has submitted a verdict in which he shows W. R. Francis as the Third-Party Defendant. Now, that is part of the title of the case, and is there any objection to that?

Mr. Sims: Yes, there is. There is another legal matter, your Honor, that I did not raise at the time of argument. I felt that the case was nearing its conclusion and I didn't want to over-emphasize to the jury—when Mr. Powers addressed the [221] jury and made the remarks that he did on the Workmen's Compensation law, I felt the plaintiff was entitled to a mis-trial, and I don't want to pass that up. I feel that we are entitled to that, and I at this time make that motion.

The Court: Motion denied.

(Short recess.)

The Court: Go ahead.

Mr. Babcock: Plaintiff excepts to the instructions given by the Court and failure of the Court

to give certain requested instructions of the plaintiff in the following respects:

Plaintiff excepts to the failure of the Court to give Instruction 10 of the requested instructions of the plaintiff.

The Court: Let's see, what is that?

Mr. Babcock: To the effect that the employees of C. D. Johnson Lumber Company conducting the work were the agents of the defendant for that purpose, and their negligence——

The Court: Well, I think this jury is an experienced jury. If you want me to say that all corporations act through agents—do you want me to do that?

Mr. Sims: Yes, I think so.

The Court: All right. I will do that.

Mr. Babcock: And the failure to give Instruction No. 11 to the effect that Dean Hutchens was not a foreman or person in charge of the work and the duty to take the precautions was not the duty of Dean Hutchens. That is based upon the provisions [222] of the law itself and the cases cited.

The Court: Exception allowed.

Mr. Babcock: We except to the failure of the Court to give in substance the requested instruction contained in requested instruction 4 in the last paragraph——

The Court: Four?

Mr. Babcock: Fourteen—in the last paragraph thereof, to make clear to the jury that there could be no sole negligence causing the accident on the part of the plaintiff, and that there wasn't——



The Court: Exception allowed. I have given that at least three different times in three different ways.

Mr. Babcock: Exception to the failure to give Instruction 17 or its equivalent and make clear to the jury that any negligence or contributory negligence on the part of the plaintiff would have to be an effective cause of the accident, the direct and proximate cause.

The Court: Well, I used the words "having contributed." Do you want me to give—if you want me to give that—it is a tougher instruction—I will give it.

Mr. Babcock: I make this comment on that, that it occurred to us that the emphasis given that the plaintiff must prove causation as contrasted with the emphasis given to the requirement that the defendant must prove causation was unfavorable to plaintiff. [223]

In connection with the instructions given, we except to the Court's frequent emphasis throughout the instructions of the burden of proof on the plaintiff with respect to the various elements of the case and particularly with respect to the burden of proof on proving the acts of negligence as contrasted with the treatment given the same subject with respect to the defendant's burden of proof, and the constant repetition through the instructions of various points of each element that the plaintiff was required to prove.

We except to the instruction given with respect to unavoidable accidents on the ground that there

is no evidence in the case which would warrant the giving of any such instruction, was never an issue in the case and was never a contention in the case.

We except to the instruction given on causation for the additional reason that it was not made clear that the negligence of the defendant need not be the sole cause but may be a contributing cause, any effective cause, particularly because there has been a suggestion in the case that the negligence or failure on the part of Francis may have caused the accident.

We except to the Court submitting to the jury the first two specifications on negligence charged against the plaintiff, first that he failed to comply with the standing instructions about going between the load and the brow log [224] because there is no evidence in the case of any such instructions having been given, and the second that he failed to load the truck in such a manner so the chains could be released on the safe side, because there is no evidence in the case that he loaded the truck.

We except to the instruction given to the effect that if Dean Hutchens made his own working conditions, and if some act of his in that connection caused the accident, there would be no recovery on the ground that the defendant through its agents have sole control.

The Court: You may have your exceptions.

Mr. Powers: May it please the Court, the defendant would request exception, if the Court please, to the failure to give defendant's requested instructions No. 1 through 9. They were requests

that the specifications of negligence be withdrawn from consideration of the jury, and the reasons stated as to why we thought they should be withdrawn are stated in the requested instructions, your Honor, so the reasons given there I will repeat here without reading them because they do appear there.

And also we ask the Court for an exception to the Court's failure to give defendant's requested instruction No. 17. I am aware of the fact that the Court has taken a different view of the law in the case than we do, and that instruction has to do with what we considered a defense in the event Hutchens [225] was an independent contractor, it being our theory that if he were an independent contractor, if he was an independent contractor, that he would not be entitled to the benefits of the Act.

The Court: You raised that in the question on the motion for a directed verdict?

Mr. Powers: Yes. The instructions go to the same. And also the following requested instruction, which is defendant's request No. 18—that would go to the same point we asked for in respect to the Court's failure to give that.

And we ask for an exception, if the Court please, to the Court's refusing to give requested instruction No. 19 of the defendant. I am not sure—I don't think that you told the jury that if the driver was in charge of the truck and the unloading operations that then the Act would not be applicable because he himself would have the responsibility for seeing that the provisions would be enforced.

The Court: Mr. Babcock took exception to that because he thought I did give it.

Mr. Powers: Well, then, we would like an exception, if the Court please, to the Court's failure to give requested instruction No. 23, which is what the logging code provides with respect to bunker chains and that they be attached so they can be released from the opposite side from the brow log, and also the binder chains, and also exception to the Court's refusal [226] or failure to give requested instruction No. 24, which also has to do with the safety code and which forbids a person from going between the truck and the brow log.

Now, then, with respect to the Court's instruction on the Employers' Liability Act as stated to the jury, that they were first to determine whether risk and danger was involved and if so the Act would apply, we would except to that because we feel that that omits the status of the decedent which in effect is along the same line that we have already discussed. That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

The Court: I know the instruction.

Mr. Powers: Yes. And you left out the intermingling of employees and probably rules as a matter of law, but we think the instruction in that respect was incorrect and should have been given.

Now, we also ask for an exception to the Court's instruction with respect to—putting it in another way—we asked for withdrawal of certain specifi-

cations of negligence and you didn't withdraw those specifications, and then your instruction respecting an additional workman we do not feel under the evidence there is any evidence that would support that instruction, so we ask for an exception in that respect.

And we also would ask for an exception with respect [227] to the Court's instruction about the rules and regulations, which is specification of negligence No. 4 which has to do with instructing or someone in a supervisory capacity to instruct. We submit, your Honor, that that rule clearly was meant and designed for the particular employer and not for any third-party employer to instruct the employees of someone else.

Now, we have asked for an exception to the Court's—the comments with respect to that signal. We feel that the only competent evidence in the case, that there is no evidence in the case other than Neal's and that there was a signal given and it was a signal to unload, and the suggestion or inference by counsel is something else, but there is no competent evidence in the case that there was no other signal to give but the one to unload that was given, and that is argument.

Then we would like exception to the measure of damages there, your Honor, and we thought maybe—or your instruction on damages which they apparently requested—we thought maybe there was over-emphasis on this 10 per cent, 25 per cent and 50 per cent, without going to 90 per cent. The jury might have got the idea they couldn't go over

50 per cent in reducing the amount of damages. We would like an exception on that in any event.

Mr. Sims: In that connection, the specials——

The Court: You may have your exceptions.

Mr. Powers: Thank you, your Honor. [228]

Mr. Sims: The specials were omitted, the funeral bills.

The Court: Oh, yes. Thank you. I realize that.

Mr. Babcock: With the Court's permission I would like to make one additional exception I overlooked. Plaintiff also excepts to the Court's failure to give requested instruction No. 12 concerning the application of the provisions of the safety codes on the ground it is contrary to the evidence.

(Whereupon the jury returned to the courtroom and were further instructed as follows:)

The Court: Ladies and Gentlemen of the jury: During the recess attention was called to the fact that I had inadvertently failed to mention two items. First, during the course of the trial it was admitted that if the plaintiff is entitled to recover, an additional item should be included of \$974.71, which is the cost of funeral and burial expenses, and you are to treat that in the same manner as you treated the other damages if you allow any damages to the plaintiff; in other words, if you find that Dean Hutchens was free from negligence and that the accident was caused solely by the negligence of the defendant you would allow the full amount of \$974.71. However, if you find him 50 per cent negligent, or any other figure up or down

from that 50 per cent, you would make a corresponding adjustment in this \$974.71. For example, if it was 50 per cent, it would be about \$482. That is an item upon which the parties have agreed. If the plaintiff is entitled to recover, all or [229] some portion should be allowed.

Now, there is one other matter. I think all of you are acquainted with the fact that a corporation operates through agents, and we have referred throughout the instructions to the negligence of the defendant, C. D. Johnson Lumber Corporation. That means merely that one or more of the agents of the C. D. Johnson Lumber Corporation were negligent, so if you find that Mr. Neal or Mr. Vincent or anyone else connected with the C. D. Johnson Lumber Corporation was negligent with respect to the particular accident, that negligence would be negligence of the C. D. Johnson Lumber Corporation.

Any exceptions?

Mr. Sims: No. There is one thing that none of us noticed, I guess, and that is that you called the attention of the jury that the death was in April, and it was in August. I don't know how that happened. It is not serious. I know it was just an inadvertence, and the jury heard the evidence. It was August.

The Court: The death did not occur in April, but it occurred in August, 1949.

I am going to submit to you two verdicts. If you find in favor of the plaintiff you will sign one verdict which reads, "We, the jury in the above-en-

titled action, find in favor of the plaintiff and against the defendant and assess plaintiff's damages in \$. . . . .," and in that blank fill in the final [230] amount you agree upon; in other words, after you have deducted the amount of contributory negligence, percentage of contributory negligence, if you find that Dean Hutchens was negligent. Now, you are to use this verdict only in the event you find in favor of the plaintiff, and it is to be signed only by the foreman. However, as you know, the verdicts in a Federal Court must be by unanimous consent, and, therefore, before a foreman may sign this verdict, or the other one, be sure that it represents the collective judgment of all the persons.

Now, there is one other matter that I forgot to tell you about. Quotient verdicts are unlawful, and I think all of you have been instructed on quotient verdicts; in other words, if you decide in favor of the plaintiff and one person decides that he ought to get one amount of money and somebody else that he ought to get a second amount, and a third person thinks he ought to get a third amount; to add up what the twelve people believe and then divide by twelve and that is your verdict, well, that is an improper verdict, and if you do make a verdict of that kind it will have to be set aside. Whatever verdict you agree upon and you put down has to be the verdict of each and every person here. Of course, you can discuss the matter among yourselves and agree on a figure, but you just can't agree in



advance that you will divide—add up all the figures and divide by twelve. Is that clear?

Now, if, on the other hand, your verdict is in favor [231] of the defendant you will have a different form of verdict, and that verdict reads, “We, the jury in the above-entitled cause, having been first duly impaneled and sworn to try the issues, find our verdict in favor of the defendant and against the plaintiff.” And like in the other, if you decide in favor of the defendant, this verdict will be signed solely by the foreman.

You will have with you these two forms of verdict, together with all the exhibits in the case.

One of the first tasks will be to eat lunch, and the bailiff will make arrangements very soon.

(At the conclusion of the charge, the jury retired to consider its verdict.) [232]

### Certificate

I, Catherine Mulvey, Official Reporter of Department No. 8 of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I have transcribed into typewriting from the notes of Glenn G. Foster, now deceased, an official reporter of the above-entitled Court, the oral proceedings had and testimony given upon the trial of the above-entitled cause on June 20, 21, and 22, 1950, before the Honorable Gus J. Solomon, Judge of the above-entitled Court, and a jury, duly impaneled and sworn; and that the foregoing and

hereto attached 232 pages of typewritten matter, numbered 1 to 232, both inclusive, constitute a full, true, and accurate transcript of the said notes of the said Glenn G. Foster.

Dated at Portland, Oregon, this 17th day of March, 1951.

/s/ CATHERINE MULVEY,  
Court Reporter.

[Endorsed]: Filed April 5, 1951.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Notice to State Industrial Accident Commission, Plaintiff's motion for separate trials, Defendant's motion requiring plaintiff to elect theory, Order segregating issues between plaintiff and defendant, etc., Pre-trial order, Verdict, Plaintiff's motion for order directing entry of judgment, Defendant's motion for judgment notwithstanding verdict of jury, Defendant's motion for a new trial, Plaintiff's motion for reconsideration of opinion on motion for new trial, Order denying motion for reconsideration of Opinion, Remittitur, Order denying motion for a new trial, Order denying motion for judgment

notwithstanding the verdict, Order directing entry of judgment, Judgment, Defendant's notice of appeal, Order allowing transmission of original exhibits, Statement of points upon which appellant will rely on appeal, Appellant's designation of contents of record on appeal, Order to correct record, Order extending time for filing remittitur, Plaintiff's notice of appeal, Plaintiff's undertaking for costs on appeal, Statement of points upon which plaintiff, cross-appellant, will rely on appeal; Plaintiff, cross-appellant's, designation of contents of record on appeal, Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5087, in which Kathleen Hutchens is plaintiff and appellee and C. D. Johnson Lumber Corporation, a corporation, is defendant and appellant; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that I am forwarding under separate cover transcript of pre-trial conferences, May 16 and May 22, 1951; Transcript of evidence June 20, 21, 22, 1951; Oral opinions dated December 5, 1950, and February 9, 1951, filed in this office in this cause, and Instructions requested by defendant C. D. Johnson Lumber Corporation, (not filed), together with plaintiff's exhibits 1 to 20, inclusive, and 23, also defendant's exhibits 1, 3, 4, 5, (2 exhibits numbered 5) and 6, five sheets with photographs attached (unmarked).

I further certify that the \$5.00 fee for filing appeal has been paid by the appellant and that the \$5.00 fee for filing cross-appeal has been paid by cross-appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 26th day of April, 1951.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 12914. United States Court of Appeals for the Ninth Circuit. C. D. Johnson Lumber Corporation, a Corporation, Appellant, vs. Kathleen Hutchens, Appellee. Kathleen Hutchens, Appellant, vs. C. D. Johnson Lumber Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 30, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

Civil No. 12914

KATHLEEN HUTCHENS,

Appellee-Appellant, Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a  
Corporation,

Appellant-Appellee, Defendant and Third-Party,  
Plaintiff,

vs.

WILLIAM R. FRANCIS,

Third-Party Defendant.

APPELLANT'S DESIGNATION OF RECORD  
TO BE PRINTED ON APPEAL HEREIN  
AND STATEMENT OF POINTS

Comes now the appellant, C. D. Johnson Lumber Corporation, and ratifies and adopts as the statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below.

Said appellant further ratifies and adopts as its designation of record to be printed in the within appeal the said appellant's designation of contents of record on appeal filed in the court below except

that exhibits referred to under item 22 are not designated for printing. In addition to the said designation of record in the court below, said appellant designates the following additional matters for printing:

1. Stipulation of parties as to printing appeal record.
2. Order of above-entitled court allowing use of exhibits in original form.

/s/ JAMES ARTHUR POWERS,

Of Attorneys for Appellant-Appellee, C. D. Johnson Lumber Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of Court of Appeals and Cause.]

APPELLEE AND CROSS - APPELLANT'S  
DESIGNATION OF RECORD TO BE  
PRINTED ON APPEAL HEREIN AND  
STATEMENT OF POINTS

Comes now the appellee, cross-appellant, Kathleen Hutchens, and ratifies and adopts as a statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below.

Said appellee and cross-appellant designates the following additional matters for printing.

1. The order extending the time for filing the remittitur.

2. Notice of appeal of the plaintiff, cross-appellant.

3. Plaintiff, cross-appellant's statement of points upon which plaintiff, cross-appellant, will rely on appeal.

4. From the record of the pre-trial conference as shown by the reporter's transcript, the following material: Beginning at Line 11, Page 24, to the end of the page, and thence to and through Line 12 on Page 25.

5. Appellee, cross-appellant's designation of contents of record.

Dated at Portland, Oregon, this 28th day of April, 1951.

/s/ HARRY GEORGE, JR.,

Of Attorneys for Plaintiff, Cross-Appellant, Kathleen Hutchens.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

---

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PRINTING  
APPEAL RECORD

It is Stipulated by and Between the attorneys for C. D. Johnson Lumber Corporation and Kath-

leen Hutchens that the original exhibits received in evidence upon the trial in the court below, together with original exhibits marked for identification and offered therein but not received in evidence may be considered by the Court in the within appeals in their original form without the necessity of being printed in the appeal record.

Dated at Portland, Oregon, this 27th day of April, 1951.

/s/ JAMES ARTHUR POWERS,

Of Attorneys for C. D. Johnson Lumber Corporation.

/s/ WM. A. BABCOCK,

Of Attorneys for  
Kathleen Hutchens.

---

[Title of Court of Appeals and Cause.]

### ORDER TO ALLOW USE OF EXHIBITS IN ORIGINAL FORM

It appearing to the Court that the original exhibits received in evidence, together with original exhibits marked for identification and offered therein but not received in evidence upon the trial in the court below, have been transmitted as part of the appeal record in lieu of copies, and that said exhibits are voluminous and include many **photographs and tables of bookkeeping entries**, and it further appearing that the parties to within ap-



peals have stipulated that the said exhibits need not be printed

It is Hereby Ordered that the said exhibits may be considered by the Court in the within appeal in their original form without the necessity of being printed in the transcript of record.

Dated at San Francisco, California, this 30th day of April, 1951.

/s/ HOMER BONE,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed May 1, 1951.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

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KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee.*

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**BRIEF OF CROSS-APPELLANT AND  
APPELLEE KATHLEEN HUTCHENS**

---

Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

---

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**United States**  
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KATHLEEN HUTCHENS, *Appellant,*

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**BRIEF OF CROSS-APPELLANT AND  
APPELLEE KATHLEEN HUTCHENS**

---

Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

---

**JURISDICTIONAL STATEMENT**

This case involves an action for damages in the sum of \$75,974.41 for damages suffered by cross-appellant, Kathleen Hutchens, by the wrongful death of her husband, Dean Hutchens, deceased, in the course of his

employment by W. R. Francis, which involved risk and danger to decedent within the meaning of the Employers' Liability Law of the State of Oregon, Section 102-1601 to 102-1606, O.C.L.A., caused by the negligence of appellant C. D. Johnson Lumber Corporation (T. 9).

The District Court of the United States for the District of Oregon had jurisdiction of said cause by virtue of 28 USCA, Section 41, sub-division 1, as amended.

The complaint and agreed facts of the pre-trial order show cross-appellant Hutchens to be a citizen of the State of Oregon and appellant, C. D. Johnson Lumber Corporation, to be a corporation organized and existing under and by virtue of the laws of the State of Nevada, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00. It is also admitted that cross-appellant Hutchens is the widow of said decedent, who left no children (T. 9, 10, 11).

On motion of appellant, C. D. Johnson Lumber Corporation, W. R. Francis was named a third party defendant. Thereafter pre-trial proceedings resulted in a pre-trial order being entered. On June 14, 1950, the Court ordered (T. 8) that there be separate trials in the case of Kathleen Hutchens v. C. D. Johnson Lumber Corporation and the case of C. D. Johnson Lumber Corporation v. William R. Francis. Thereupon, the case of Kathleen Hutchens v. C. D. Johnson Lumber Corporation was tried before a duly impanelled jury, which returned a verdict in favor of cross-appellant in the sum of \$68,377.20. Thereupon, appellant C. D. Johnson Lumber Corporation filed a motion for a new trial and a

motion for a judgment notwithstanding the verdict, which were duly opposed by cross-appellant. Thereupon the Court, in a memo opinion of December 5, 1950 (T. 76) ordered:

"I do not believe that the amount of the verdict is so disproportionate to plaintiff's loss as to establish passion or prejudice in a jury's deliberations or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial Judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that when the verdict of the jury is clearly excessive it is the duty of the trial Judge to refuse to permit such an award to stand.

"I have carefully considered all the evidence touching on damages and I believe that the verdict of the jury is excessive to the extent of \$21,877.20. Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein the motion for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered for the remaining sum of \$46,500.00 with costs; but, if such remittitur is not so served and filed on or before December 20, 1950 the motion for a new trial will be allowed."

That thereafter, cross-appellant duly protested (T. 63) and objected to the said memo opinion and thereafter filed its conditional and limited remittitur (T. 66) of \$21,877.20, in which cross-appellant continued to protest and object, and stating that the remittitur was filed without prejudice in the event the appellant appealed from the judgment entered pursuant to said con-

ditional remittitur to the rights of the cross-appellant to appeal the action of the Court in conditioning its order denying the motion for a new trial upon the filing of a remittitur. Thereafter the Court approved said conditional remittitur and judgment was entered at the direction of the Court (T. 71) in the sum of \$46,500.00. Thereafter appellant filed its notice of appeal.

The Court of Appeals has jurisdiction on this appeal under Title 28 U.S.C.A., Section 1291.

Cross-appellant appeals from the order of the Court entering judgment in the sum of \$46,500.00 instead of \$68,377.20, the amount awarded by the jury, and upon the Court's order denying the motion for a new trial conditional upon the filing of a remittitur, and in failing to direct the entry of a judgment on the verdict, and in directing entry of a judgment on a verdict as reduced. (Note: In this brief "T" means and refers to the Printed Transcript of Record.)

## **COMBINED STATEMENT OF FACTS OF CROSS-APPELLANT AND APPELLEE, KATHLEEN HUTCHENS**

Cross-appellant makes the following statement of facts for both her cross-appeal and for her answering appeal as a supplement to appellant's statement of facts to avoid undue repetition.

The cross-appellant-plaintiff as widow of the decedent (T. 9) brings this action under the Employers' Lia-

bility Act of the State of Oregon (T. 11). Substantially all of the facts in this controversy are undisputed, leaving principally before the court the question of their legal effect.

The facts as disclosed by the evidence are that the cross-appellant-plaintiff, aged 23 years (T. 174) was married to Dean Hutchens, aged 21 years, her high school sweetheart, on November 30, 1947 (T. 175). The deceased at the time of his fatal injury was employed by Francis, a small logging contractor, to haul logs at so much per thousand board feet with his own truck (T. 160). Francis at that time was operating under a contract with defendant C. D. Johnson Lumber Company (T. 277), to fall, buck, yard and haul a large block of defendant Johnson's timber (T. 281, 285). The logs were being delivered by Francis at Appellant Johnson Corporation's Log Dump at Toledo, Oregon. This dump was an integral part of C. D. Johnson's sawmill and logging operation (T. 9). Appellant Johnson Corporation had a large number of other logging contractors hauling logs to their Toledo log dump and boom grounds (T. 284).

Appellant Johnson Corporation's unloading dump, at their tidewater sawmill on the Yaquina River, which is also known as the Toledo Log Dump, consisted of three different large brow logs on a ramp above tide-water, which tidewater varied several feet with the ebb and flow (T. 122); said ramp or elevated roadway consisted of a main deck next to the brow logs upon which the loaded trucks or logging trains operated. There was an elevated deck next to said roadway located 3 or 4 feet

higher than the main deck; an unloading crane which was a reconverted Erie Shovel, mounted on caterpillar tractor treads, operated on the higher level (T. 122). The unloading crane was moved from brow log to brow log as appellant Johnson Corporation directed so that logs dumped into the water could be efficiently handled by appellant Johnson Corporation's boommen and scalers, who placed the logs in boomstick compartments in the water (T. 121, 123).

Appellant Johnson Corporation's log dump foreman, Clyde C. Vincent, testified (T. 112) "I am in charge of the boom crew there in regards to telling the men what time of day to come to work and planning the work to be done, how we are going to take care of the logs." This boom foreman stated that he was the person who determined which of the three brow logs would be used (T. 121). The company posted a set of working rules that all truck drivers and other workmen were bound to follow and which were enforced by the boom foreman (T. 262). The rules (T. 261; Def's Ex. No. 6) required all truck drivers, including the decedent, to leave their binder chains on their loads in a tightened condition until the sling lines were attached and made taut. The unloading operation at the dump was solely owned, maintained, controlled and operated by appellant Johnson Corporation, and no truck driver had any control directly or indirectly of the unloading operation.

Trucks could only be unloaded by appellant Johnson Corporation's employees operating its unloading crane. Thus as to unloading, the hours of the day, starting and stopping time, the days and the times such as holidays,



Saturdays and Sundays, when no work was done, was determined by the appellant Johnson Lumber Corporation, and to which all log truck drivers delivering logs to that dump had to conform (T. 10, 11, 112, 123). The average day saw 20 different log trucks dumping 80 loads of logs (T. 142). If more than one truck load had arrived at the dump to be unloaded simultaneously, the company determined the order of unloading and whose turn it was to be unloaded. When the Company determined which brow log was to be used (T. 121) all the drivers were directed to drive their loaded trucks to a spot indicated by appellant's unloading engineer. When the load reached this spot he stopped on a whistle signal from the unloading engineer. The driver then was required to descend, attach the sling lines to the hoisting cable, after which the unloading engineer tightened the sling lines, then the driver was required to release his cheese block that form a cradle for the logs to lie in and to take off his binder chains (T.124). The engineer was the sole person, so the log dump foreman testified, and the engineer admitted whose duty it was to see that all workmen were in the clear before he dumped the logs into the water (T. 138, 152). This included workmen who might be in the pond near the brow log as well as on the ground. The engineer then applied his power, which tightened and raised the sling lines, rolling the logs on the load from the truck over the brow log into the water. Then the truck driver was required to move his trailer under the hoisting hook, connect the trailer to the hoisting hook, disconnect his air lines and trailer, reset his cheese blocks, put his binder chains in

his cab, and enter his driving cab (T. 124). The appellant's engineer then raised the trailer into the air and at directions from appellant's unloading engineer, the driver backed his truck under the raised trailer to the right place to allow the engineer to lower the trailer onto the correct position on the truck to carry it (T. 133). The driver then returned to the woods for another load.

On August 19, 1949 at about 9 AM, Dean Hutchens arrived at the landing with a one-log load, the log being 52 inches in diameter, approximately 40 feet long, and weighing about 30,000 pounds (T. 10, 169). At the direction of the appellant's unloading engineer, he drove and stopped at a position under the hoisting hook of the unloading machine on the whistle signal (T. 10, 143). He then descended from his cab and attached the sling lines to the hook attached to the hoisting cable after which the engineer tightened the sling lines. He then released his cheese blocks and proceeded to loosen his binder chains. Binder chains on a many-log load are a single continuous chain, wrapped around the logs and fastened on the side away from the brow log. To remove the chain the driver unfastens the chain and then draws it to him in a pile as he stands by the side of his load. On a single-log load the chain must, of necessity, be arranged differently if it is to serve any purpose. One end of the chain is securely attached to the bunk block, then run over the log and fastened to the other end of the bunk (T. 143, 144). To free the chain it must be unfastened from both ends (T. 144). If the chain is left attached to the bunk on the brow log side when the huge, heavy log rolls off it might foul on the chain,

carrying the chain, the bunks, and could even carry the trailer into the water, causing great damage and making the driver dive for his log chain or lose a valuable and necessary part of his equipment. Having released his binder chain on the engineer's side of his load, the deceased signalled the engineer that he was going in between the load and the brow log to release the other end of the binder on his trailer (T. 145, 146). The log dump foreman sitting on a pile of lumber near the log-loaded truck, got up to see if workmen were in the clear (T. 119, 145). To do so he walked to a position where he could see down the brow log where decedent was releasing his chain. He attempted to excuse himself by saying he only looked to see if the pond was clear of workmen. To arrive at this spot he had to walk about 14 feet (T. 147) and then return about half that distance, when he signalled the engineer that all was clear. Then it became the duty of the unloading engineer to see that all workmen were in the clear, which he admitted he did not do. The 72-year-old engineer (T. 147) without looking to see if the deceased was in the clear, applied his power, rolled the 30,000 pound log off, crushing Dean Hutchens against the brow log (T. 148) and tumbling the log into the water.

It is admitted that the unloading premises and equipment were those of appellant Johnson Corporation and appellant alone maintained the dock and furnished the brow log, unloading crane, unloading engineer, boom foreman, and boommen (T. 155). The evidence further showed that the operation of the entire dump was under the direction of appellant's log dump foreman and the

actual unloading machine's operation under direction of appellant's unloading engineer. The evidence, uncontradicted, showed that Dean Hutchens had no right, power, or authority to direct any one connected with the unloading operation. He could not give orders to the unloading engineer, boom foreman, or scaler (T. 285, 286). He could not dictate the brow log to be used, the starting or stopping time of the unloading machine, nor was he permitted to operate the unloading machine himself if he were to wish to work when the unloading crew was not present. It was stipulated that Dean Hutchens had a right under a contract to be on the premises in delivering the logs (T. 171).

The unquestioned testimony also shows that decedent was 21 years old at the time of his death, with an admitted life expectancy of 44 years (T. 11). That he had a gross monthly income of approximately \$1500 to \$1800; that he had a net monthly income of approximately \$300 (T. 175) over and above his monthly truck payments of \$400 on his logging truck that was rapidly being paid for (T. 177). Testimony was given without being contradicted that a life annuity paying \$1000 per year for a woman 23 years of age and a man 21 years old would have a present value or cost of \$33,917.00 (T. 221). The evidence further showed that decedent was in perfect health, a good industrious worker, a good mechanic, having no bad habits, who did not drink or smoke, saved his money, and was working toward buying a farm (T. 178), and performed personal services for plaintiff of pecuniary value, including advice and counsel of the management of the business affairs of the family.

The jury was also permitted to examine decedent's income tax statements offered in evidence without objection (T. 176).

## **SPECIFICATION OF ERRORS**

### **I.**

The Court erred in failing to enter a judgment on the verdict in its entirety and in failing to grant plaintiff's motion for an order directing entry of judgment on the verdict in its entirety.

### **II.**

The Court erred in making the order denying the motion for a new trial conditional upon the filing of a remittitur.

### **III.**

The Court erred in denying the motion for reconsideration of opinion on motion for a new trial, and in failing to reverse such an opinion, and in failing to direct entry of a judgment on the verdict.

### **IV.**

The Court erred in holding that the amount of the verdict was excessive and that such amount should be reduced, and in directing that unless a remittitur was filed a new trial would be granted.

### **V.**

The Court erred in making its order directing entry of judgment on the verdict as reduced.

The Court then went on to say it believed the verdict to be excessive to the extent of \$21,877.20 and directed that the plaintiff file a remittitur of said amount or that the motion for a new trial would be granted, further directing that if it were filed both motions of the defendant would be denied. Protest by exception was promptly taken by cross-appellant to this action of the Court. Later, and still under protest, the cross-appellant filed its conditional remittitur in the amount specified by the Court wherein it was specified "this remittitur is filed without prejudice in the event the defendant appeals from the judgment entered pursuant to such remittitur to the rights of plaintiff to appeal the action of the Court in conditioning its order denying the motion for a new trial upon the filing of such remittitur." This remittitur was approved by the Court and then filed, after which orders denying the motions for new trial and judgment notwithstanding the verdict were entered. Thereupon an order directing entry of judgment was entered stating that cross-appellant had filed her remittitur pursuant to the directions of the Court as a condition of denial of motion for new trial, which remittitur had been approved by the Court. The judgment was thereupon entered in the sum of \$46,500 and also recited that the remittitur was approved by the Court.

The record is clear that at all times cross-appellant protested the condition requiring the remittitur and made the remittitur under protest and never at any time acquiesced in or voluntarily made the remittitur.

## ARGUMENT

In order to expedite matters, considering the nature of this case, and not to be repetitious and unduly lengthen this brief, we believe that much of the same argument is applicable to all of the specifications of error in this case and we will, therefore, proceed with one argument.

**(1) Where the judgment of the trial court does not follow the verdict, the court on appeal may correct the error and enter the judgment the trial court should have entered.**

*(a) A conditional remittitur under protest is not a waiver or relinquishment of cross-appellant's right to appeal.*

The jury after careful consideration of the evidence and following the instructions announced by the Court, returned a verdict in favor of the cross-appellant and against the appellant C. D. Johnson Lumber Corporation in the sum of \$68,337.20. The Court, thereafter, in its memo opinion, when considering plaintiff's motion for an order directing entry of judgment based upon the verdict of the jury and defendant's motion for judgment notwithstanding the verdict and for a new trial stated, "I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberations or to be shocking to the Court's conscience."

Waiver is the voluntary relinquishment of a known right. There never at any time has been any waiver or relinquishment of the right to object by appeal or otherwise to the Court's action in requiring the remittitur on the part of the cross-appellant. It has been at all times the position of cross-appellant that when the jury's verdict was \$68,377.24 and there was no error in the record, that in a diversity of citizenship case the Court was without power to demand a remittitur and without power to enter a verdict in any amount other than that found by the jury in the State of Oregon. The Court recognized that the remittitur was made under protest and that the right of appeal was reserved to question the power of the Court in its remittitur action when it approved the qualified remittitur. It is pointed out to the Court that voluntary remittitur cases would not apply to this situation. Cross-appellant contends that the situation is the same as in *Peerless Oil and Gas Co. v. Teas*, 138 S.W. 2d 637, wherein the appellate court, in a similar situation, stated that where a wronged plaintiff tenders a required remittitur under protest the appellate court should examine the case as to the correctness of the trial court's action and to render a judgment in the amount found by the jury, if the verdict was found to be not excessive under the facts in the case. (At page 642.)



(b) *Where the trial Judge had no legal right to require the filing of a remittitur, the purported remittitur is of no legal import and leaves the record as though none had been filed.*

It might be possible to contend that this Court should not disturb the trial court's action in rendering judgment for a less amount than that found by the jury because if the Court had been faced with the alternative of rendering judgment for the full amount or granting a new trial, it should have granted a new trial. However, a trial court can commit error in granting a new trial as well as any other official act. The fact that such a ruling is not considered a final judgment from which an appeal will lie would not prevent it from being legal error. In Oregon, an appeal would lie from an order granting a new trial. If the trial court would have committed error in granting a new trial in this case its threat to do so is not based on law or legal right and amounts to duress. In this case the Court recognized that its action in requiring a remittitur might be error so, in fairness to cross-appellant, approved the conditional remittitur preserving to cross-appellant the right to question the court's action on appeal.

Duress exists when a person does an act unwillingly in compliance with an unlawful threat in order to avoid loss of property. In *Ward v. Scarborough*, 236 S.W. 441, the Court said:

"That there may be duress of property as well as person is now thoroughly established. Quoting *McGowen v. Bush*, 17 Texas 196, 201; *Oliphant v.*

*Markham*, 79 Tex. 543, 548, 15 S.W. 569, 23 Am. St. Reports 363.

"To constitute duress it is sufficient if the will be constrained by the commission's presentation of a choice between comparative evils as inconvenience and loss by the detention of the property, loss of property altogether, or compliance with an unconscionable demand. 9 RCL p. 723; *Harris v. Carey*, 112 Va. 362, 71 S.E. 551, Ann. Cas. 1913A, 1350.

"Duress of property cannot exist without there being a threat to do some act which the threatening party has no legal right to do, some legal exaction or some fraud or deception. The restraint must be illegal and such as to destroy free agency without present means of protection. 9 RCL Page 723; *York v. Hinkle*, 80 Wis. 624, 50 N.W. 895.

"The restraint, intimidation, or compulsion is sufficient if it induces the particular person claiming duress to perform some act which he is not legally bound to do, contrary to his will. There is no discrimination against the weak or timid. *Landa v. Obert*, 78 Tex. 33, 52, 14 S.W. 297; *First National Bank v. Sargent*, 65 Neb. 594, 91 N.W. 595, 59 L.R.A. 296, 301.

"The fact that duress in this instance was practiced by the Court would not make the 'consent' any more genuine. A judgment is a species of property growing out of but unlike the cause of action on which it is based and if trial courts can arbitrarily and unlawfully force reductions of judgments under the threat of wiping it out completely, without the litigant having any right to protest and have his protest reviewed, our jurisprudence is not accomplishing its proper function. It is a familiar rule that 'a bond which is wrongfully demanded under color of official authority or as a condition to some act, privilege or benefit to which the maker is entitled without bond, is void for duress.' 7 Tex. Jur. 67, 68."

It is suggested that the so-called remittitur filed by cross-appellant has no legal effect because the trial judge had no legal right to require that it be filed and that the action of the trial court in rendering judgment for less than \$68,377.20, to which cross-appellant accepted, is an error apparent on the face of the record that this honorable court can and should correct.

Almost the same situation occurred in *Peerless Oil and Gas Company v. Paul C. Teas*, *supra*, and in the case of *General Accident, Fire and Life Insurance Corporation v. Brundren*, 283 S.W. 491, where the case was tried on special issues, the trial court indicated after the verdict was brought in that it considered as too large the jury's finding that plaintiff's capacity to labor in the future had been impaired 75% and the plaintiff's attorneys in this case filed what they termed a "remittitur" purporting to reduce the percentage of incapacity from 75 per cent as found by the jury to 50 per cent. The plaintiff failed to protest this action of the trial court or to except as to the judgment based thereon and give notice of appeal as was done by cross-appellant in the present case. In affirming the judgment of the trial court, the Commission of Appeals, in an opinion by Judge Short, said:

"We do not believe that the action of the defendant in error, followed by the action of the trial court in rendering a judgment for a less amount than the verdict of the jury authorized, was in violation of the articles mentioned, since the instrument called a remittitur is of no legal importance, and, as said by the Court of Appeals in its opinion, the legal situation then can stand as if none had been filed. . . .

"In this case, the record shows that the testimony did support a finding that defendant in error suffered a loss of 75 per cent of his normal capacity to labor, and therefore this finding of fact by the jury is definitely proven to have been the result of a proper exercise on the part of the authority to weigh the evidence and determine the facts therefrom. In other words, the finding of fact by the Court of Civil Appeals would authorize the reduction of a judgment based on the finding of fact by the jury that the defendant in error did suffer a loss of 75 per cent of his capacity to labor and the judgment of the District Court to this extent was not only erroneous but was prejudicial to the legal rights of the defendant in error, but for the fact that the latter seems to have acquiesced in the judgment rendered in his favor and is thereby estopped from claiming the benefit of the error committed by the trial court. (283 S.W. 494)."

As in our case, there is nothing to be purged and the Court violated the Constitution of the State of Oregon in rendering a judgment that does not conform to the pleadings, the nature of the case proved, and the verdict.

That the verdict was not excessive is shown by a survey of recent decisions appearing in 4 NACCA Law Journal, Nov. 1949; 5 NACCA Law Journal, p. 214; 6 NACCA Law Journal, November 1950.

The cross-appellant having complied with the Court's unlawful requirement under protest and having accepted the order requiring a remittitur and the judgment based thereon and the final judgment having provided that the same was without prejudice to the cross-appellant's right to complain of the amount of the remittitur ordered by the Court and cross-appellant having given notice of

appeal to said Court's action in reducing the judgment, this feature is squarely before this Court for review.

**(2) If the amount of the excess cannot be separated and fairly ascertained a remittitur should not be ordered by a trial court.**

Cross-appellant recognizes that the District Court is clothed with the responsibility and duty to grant new trials under many conditions and that as a general rule his action in regard to the matter will not be disturbed. Here the Court found no error in the record, no passion and prejudice in a jury's deliberations, but only that in the opinion of the Court the verdict was clearly excessive.

The rule has been uniformly applied where the Court can, with mathematical certainty, determine the amount of a correct verdict, it is its duty to save the parties the expense of a new trial to reduce an excessive verdict to the correct amount. But where the record does not make a mathematical determination possible in unliquidated damage cases, it should not substitute its opinion for that of the jury and enter a judgment for a lesser amount, but can only order a new trial. *Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc.*, 118 F. 2d 252; Cyc. of Federal Procedure, 2nd Ed., Vol. 8, page 162, Note 91. The Court in such a situation finds in effect a failure of proof to sustain the full amount but sufficient proof to sustain the lesser amount. The evidence on damage in this case does not occupy a great deal of space in the record. The jury returned a verdict of \$68,377.20, which included \$974.71 the agreed dam-

age for funeral expenses. The jury was directed to take into consideration contributory negligence of the decedent and the pecuniary value to the cross-appellant of the loss of advice and counsel as to the business affairs of the family. The jury arrived at this figure from the evidence that decedent was 21 years of age at the time of his death, with a life expectancy of 42 years. That at the time of his death he was earning a gross income of \$1500 to \$1800 per month, with a net income of \$300 per month over and above of \$400 a month payments on the conditional sales contract of his truck. That a life annuity paying \$1,000 a year for a woman 23 years of age, or a man 21 years of age, would have a present value of \$33,917. The income tax record of the decedent for the year 1948 showed a net income of \$1,256.28, and for the first 8 months of 1949 his net income was \$2,127.59, which the Court in its memo opinion calculated to make him a yearly income for the year 1949 of \$3,000.00. The evidence further showed the decedent was in perfect health, a good, industrious worker, a good mechanic, having no bad habits, who did not drink or smoke, saved his money, and was working toward buying a farm. It further demonstrated that he performed personal services having a pecuniary value for cross-appellant by way of advice and counsel as to the management of the business affairs of the family.

Sincere and honest effort has been made to discover a conceivable mathematical basis by which the Court could arrive at the figure of \$21,877.20 as the figure by which the proof failed or the jury wrongfully exceeded, to no avail.

That there was substantial evidence to support the jury's verdict of \$68,377.20 in the record is easily demonstrated. The actuary testified that the present worth of \$1,000 for a woman 23 years old was \$33,917. The annual income of decedent as shown by his income tax statements was approximately \$3,000. Therefore 3 times \$33,917 would give the present worth of \$101,751. In addition to this the parties stipulated the damages due to funeral expense were \$974.41. This does not add anything for the personal service and advice and counsel and management of business affairs of the family that has substantial pecuniary value, or the recognized fact that a man's income usually increases after he reaches the age of 21. But if the testimony of the wife is taken to the effect that he netted \$300 per month plus \$400 paid on his truck, or \$700 per month, is used, we have a yearly income of \$8400, which, on the basis of \$33,917 for each thousand, gives a present worth of \$284,902.80. This exhausts all of the testimony on damages, none of which was controverted. However, it must be remembered that the complaint limited the recovery of cross-appellant to \$75,000 and funeral expenses. That the jury arrived at their verdict in a thoughtful and accurate manner, following closely the instructions of the Court, is demonstrated as follows: The evidence showed greater damage than was permitted under the complaint. Therefore, the jury started at \$75,000.00, the amount to which the recovery was limited, and to this added the sum of \$974.71, the agreed amount of the funeral expenses, which made a total of \$75,974.71. Then the jury having determined that the decedent's own negligence con-

tributed 10% to his death, which was admitted by counsel in the argument, reduced this amount by \$7,597.41, leaving \$68,377.24, which is within 4¢ of the verdict of the jury. Diligent and exhaustive search of the record has failed to discover any evidence that would establish either a failure of proof for the sum found by the jury or proof that the pecuniary loss of cross-appellant was \$21,877.20 less than that found by the jury, or was only no more than \$46,500. It is apparent that the Court must have used some method to arrive at this figure to have been able to establish the excess down to the fine point of 20¢ but it is likewise apparent that to do so he was required to substitute his judgment for that of the jury and not being able to designate mathematically the overplus he erred in requiring a remittitur.

**(3) United States District Courts cannot undermine by procedural requirements, a state rule which substantially affects the rights of the parties.**

(1) The United States District Court, when enforcing a right arising under State law, may not take any action which affects substantive rights as given by State law and its constitution.

*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.C. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938), as interpreted by:

*Guaranty Trust Company of New York v. Grace W. York*, 326 U.S. 99, 65 S.C. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945).

*Palmer v. Hoffman*, 318 U.S. 109, 63 S.C. 477, 89 L. Ed. 645, 144 A.L.R. 719 (1943), both citing with approval:



*Simpson v. Channel*, 110 F. 2d 754, 128 A.L.R. 394 (1940) (First CCA).

See also: *Stoner v. New York Life Insur. Co.*, 311 U.S. 464, 61 S.C. 336, 85 L. Ed. 284 (1940).

The Simpson case, in discussing whether burden of proof is "substantive" or "procedural" says (128 A.L.R. at 398):

"Therefore, inasmuch as the older decisions in the Federal courts, applying in diversity cases, the Federal rule as to burden of proof as a matter of 'general law', are found upon an assumption no longer valid since *Erie R. Co. v. Tompkins* . . . , their classification of burden of proof as a matter of substance should be re-examined in light of the objective and policy disclosed in the Tompkins case."

On the basis of the Guaranty Trust Company case, the Palmer case and the Simpson case, the American Law Institute in its 1948 Supplement to the Restatement of the Law of Conflicts of Law added the following note to the introduction to Chapter 12, part of which chapter distinguishes substance and procedure in the conflicts sense:

"This chapter does not deal with the rules pertaining to the extent to which federal courts apply state law and conversely . . . because the solution of such problem is no part of Conflict of Laws."

(a) It is submitted that the true test of the rule behind the Tompkins decision has been stated by the United States Supreme Court in the Guaranty Trust case, where the Court said, in discussing burden of proof (326 U.S. at 109, 160 A.L.R. at 1237):

*“Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between the State and Federal courts. In essence, the intent of the decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be tried in a state court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal instead of in a State court a block away should not lead to a substantially different result. . . . *Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the Federal Courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.”

See also, *Cyclopedia of Federal Procedure*, 2nd Edition, Callaghan and Co., 1943, Sec. 716, which says, in part (page 383 of Vol. 3):

“It is a fair, if not necessary, construction of that case that it commits the Supreme Court to the position that Congress is without power to declare what rules of substantive law shall govern the federal courts, and that neither Congress nor the Supreme Court has power to declare a state rule of substantive law to be other than the courts of the state have established it, nor can they undermine such a substantive rule or destroy it by procedural requirements.”

The rules of civil procedure provide that they “shall neither abridge, enlarge nor modify the substantive

rights of any litigant". The Congress thus recognized the distinction between substantive law, which generally speaking creates, defines and regulates rights, and procedural law or adjective law, which prescribes the methods of protecting rights or obtaining redress for their revision (1 C.J.S. 1468; 52 C.J.S. 1026; 40 Words and Phrases, 524, Permanent Edition).

*Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), holds that in a diversity case a federal court must follow both the applicable statutory and court decision law of the state. The *Guaranty Trust v. York*, 326 U.S. 99 (1945), holds that when a federal court in the exercise of its diversity jurisdiction is called upon to adjudicate a "stated created right", it becomes to that purpose in effect only another court of the state, and it cannot substantially affect the enforcement of the rights as created by the state. In discussing the *Erie* case, it stated, "in essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court shall be substantially the same, so far as legal rules determining the outcome of the litigation, as it would be if tried in a state court."

In *Ragan v. Merchants Transfer Company*, 337 U.S. 530 (1949), where the effect of a state statute of limitations was in question, it was held in effect that where a claim arises out of state law, the federal court must ascertain if and to what extent it is limited, modified, or substantially affected by state law, and if there is any state law which substantially affects the claim it

must be applied regardless of whether, in the conventional situation, it is substantive or remedial in character. Moreover, if there is a conflict between the state law and the rules of civil procedure, the former, it would seem, would prevail. The court has further said, in *Woods v. Interstate Realty Co.*, 337 U.S. 534 (1949), that under the rule of *Erie v. Tompkins*, in a diversity case, if the courts of the state are closed to an action it may not be brought in a federal court. This rule was further extended, and by plain inference followed, in *Cohen v. Beneficial Loan Corporation*, 337 U.S. 541 (1949), where it is suggested that if the rules had in any material particular been in conflict with the state law, the latter would govern.

In the instant case, we can say that the action of the trial court was to materially de-limit and modify cross-appellant's right of action and right to recover by substituting its judgment for that of the jury, which action was contrary to state law.

(b) Further authority in support of cross-appellant's proposition is cited as follows:

*Brown v. Western Railway of Alabama*, 338 U.S. 294, ..... S.C. .... (1949), the converse of the present case was before the United States Supreme Court in a case where a state court was used to enforce a federal right arising under the Federal Employers' Liability Act. The trial court sustained a general demurrer to the complaint and dismissed the action. The state rule declared that such a dismissal was a bar to further action. Affirmed in the state appellate court. On appeal to the

U. S. Supreme Court, it was held that the state rule was not binding in this case. At p. 296, the majority of the court said:

“The argument is that while state courts are without power to detract from ‘substantive rights’ granted by Congress in FELA cases, they are free to follow their own rules of ‘practice’ and ‘procedure’. . . . A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice.”

*Brady, Administratrix v. Southern Railway Co.*, 320 U.S. 476, .... S.C..... (1943). Again a converse situation where an action under FELA was brought in a state court. A judgment for the plaintiff was reversed by the state supreme court on the ground that the evidence was insufficient to support the verdict of the jury. On appeal it was held (at p. 473):

“Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.”

In *Palmer v. Moran*, 44 F. Supp. 704 (1942), the Federal District Court for the Middle District of Pennsylvania heard a diversity case arising out of an automobile accident in Pennsylvania. The Federal District court ordered a remittitur and quoted from a specific Pennsylvania statute as the basis for its authority to request such a remittitur.

In each of the following cases, a state created right

was being enforced in a Federal court because of the diversity of citizenship of the parties. In each case, the Federal court relied upon state law to govern when the question of sufficiency of evidence was at issue:

*Gutierrez, et al. v. Public Service Interstate Transport Co.*, 168 F. 2d 678 (1948), 2d CCA.

*General Acc. Fire & Life Assur. Corp., Ltd. v. Schero, et al.*, 100 F. 2d 775 (1947), 5th CCA.

*Van Sant v. American Express Co.*, 169 F. 2d 355 (1947), 3rd CCA.

*Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F. 2d 908 (1948), 3rd CCA.

*Waldron v. Aetna Casualty & Surety Co.*, 141 F. 2d 230 (1944).

*Bergeron v. Mansour*, 152 F. 2d 27 (1945), 1st CCA.

*Carter v. Kurn, et al.*, 127 F. 2d 415 (1942), 8th CCA.

*Walker v. Prud. Ins. Co. of America*, 127 F. 2d 938 (1942), 5th CCA.

*Cooper v. Brown*, 126 F. 2d 874 (1942), 3rd CCA.

*Sierocinski v. E. I. Dupont De Nemours & Co.*, 118 F. 2d 531 (1941), p. 534.

*Lennig v. New York Life Ins.*, 122 F. 2d 871 (1941), 3rd CCA.

*Allen v. Pa. R. Co.*, 120 F. 2d 63 (1941) 7th CCA.

*Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), see 30 Or. L. Rev. p. 555.

*Huddleston v. Dwyer*, 322 U.S. 232 (1944).

(c) The effect of the *Erie R. R. v. Tompkins* doctrine was recognized by the Court of Appeals for the Ninth Circuit in *Covey Gas and Oil Co. v. Checketts, et ux*,

187 F. 2d 561 (1951), where the power of the Federal appellate court under the Federal rules and the power of the Idaho appellate court under Idaho rules happened to coincide. This court said:

“The decisions cited above make it unnecessary to consider the contention of appealing cogency, that a jury-tried diversity suit based upon a liability based upon a state statute and not existing at common law is not a ‘suit at common law’ as that term is used in the Seventh Amendment. That contention involves the effect of *Erie R. R. v. Tompkins*. . . .”

The Oregon Supreme Court has held that the right of action created under the Oregon Employers' Liability Act is a statutory cause of action which did not exist at common law. *Piukkula v. Pillsbury-Astoria Flour Mills*, 150 Ore. 304 (1935).

(2) The United States District Court, in an action brought under the laws of the State of Oregon based upon diversity of citizenship of the parties, is without power to set aside a verdict where there has been no error in the trial in a case involving unliquidated damages on the sole ground that the damages are excessive and the District Court is also without power to order a new trial on such grounds if the plaintiff fails to file a remittitur.

(a) By virtue of the provisions of Amended Article VII, Section 3, of the Constitution of the State of Oregon, a trial court cannot set aside a verdict for unliquidated damages on the sole ground that it is excessive unless the trial court can affirmatively say that there is no evidence to support such verdict.

*Van Lom v. Schneiderman*, 187 Ore. 89 (1949), holds:

“In the State of Oregon, the Circuit Courts no longer have the power to set aside a verdict in an action for unliquidated damages on the ground that the verdict is excessive. . . . Article VII (a) 3 of the Constitution of Oregon governing this matter is not a grant of power through the Courts but a limitation of their power. . . .”

The Court went on further to quote from the Oregon Constitution as follows:

“ . . . and no fact tried by jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. . . .”

The same is true of the Supreme Court of the State of Oregon.

The Court then went on to say:

“This last clause forbids re-examination of a fact found by a jury otherwise than by another jury (citation), and is transgressed every time that a court undertakes to revise or correct a jury’s finding of fact. . . .”

*Timmings v. Hale*, 122 Ore. 24, 43 (1927).

*Buchanan v. Lewis A. Hicks Co.*, 66 Ore. 503, 509, 512 (1913), in the denial for the petition on rehearing.

*Gillilan v. Portland Crematorium Assoc.*, 120 Ore. 286, 296 (1927).

Dictum in *Hust v. Moore-McCormick Lines, Inc.*, 180 Ore. 409 (1947).



(b) Nor can a trial court in the State of Oregon, *under the same circumstances*, direct that a remittitur be submitted in lieu of an order for a new trial.

*Gillilan v. Portland Crematorium Assoc.*, 120 Ore. 286, 296 (1927), in which a trial court sua sponte reduced a verdict as excessive where there was no error on the record. The Supreme Court of the State of Oregon at p. 296 stated that the Circuit Court had no such authority. See also *Van Lom v. Schneiderman*, *supra*.

It is contended that the language "revise or correct" is sufficiently broad and was intended to be sufficiently broad so as to cover the direction of a remittitur by the trial court in lieu of a new trial. Logically, once the premise is established, as it has been, that the trial court cannot set aside a verdict as excessive, it would be a non sequitur to argue that the trial court can still force a revision of the jury's findings through the demand for a remittitur. Considered from a practical standpoint, because of the known time delay, cost, and uncertainty of a new trial, to allow such a power to remain in an Oregon trial court, would be tantamount to a denial of the Constitutional protections found in Amended Art. VII, Sec. 3 of the Oregon Constitution.

(3) The failure of the United States District Court to recognize the dictates of the Amendment to the Constitution of the State of Oregon substantially affects the rights of the parties as they existed under the law from which they arose.

*Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409. Where a right arising under a Federal statute was tried

by an Oregon court. On appeal the Oregon Supreme Court was asked to exercise powers granted to it by Amended Article VII, Section 3, of the Oregon Constitution. The Oregon court refused to exercise such powers in this case because it said the Oregon court must act in a manner similar to that in which a federal appellate court would act when reviewing the action of a federal court (quoting at p. 418 from *McCauley v. Pacific Atlantic Steamship Co.*, 167 Or. 80 (1941), a decision consonant with the argument in this brief). At pages 429-430, the Oregon court said that the relationship between the judge and jury was substantive in nature and that the amendment to the Oregon Constitution could not be followed under the guise that it was merely procedural for to do so would basically alter the rights of the parties.

See also: Cases and material cited under 1(a) above and

Judge Herbert F. Goodrich, *Handbook of the Conflicts of Laws*, 3rd edition, West Publishing Co., 1949, pp. 40-45.

## SUMMARY

A conditional remittitur reserving unto cross-appellant the right to appeal the act of the Court in requiring it is not a waiver or relinquishment of cross-appellant's right to appeal. Further, the trial court had no legal right to require that a remittitur be made, so the purported remittitur is of no legal effect and leaves the record as though none had been filed. Where the amount

of the excess of the jury's verdict over the proof cannot be separated and fairly ascertained, the court erred in requiring a remittitur. United States District Courts cannot undermine by procedural requirements or otherwise a state rule that circuit courts of the State of Oregon no longer have the power to set aside a verdict in an action for unliquidated damages on the ground that the verdict is excessive unless the trial court can affirmatively state that there is no evidence to support the verdict. In all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a state court. A trial court can commit error in granting a new trial or threatening as an alternative to require remittitur. The Court should correct the trial court's error and direct that judgment be entered to conform to the verdict of the jury.

Respectfully submitted,

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No. 12914

In The  
**United States Court of Appeals**  
**For the Ninth Circuit**

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C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellant*,

vs.

KATHLEEN HUTCHENS, *Appellee*.

KATHLEEN HUTCHENS, *Appellant*,

vs.

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee*.

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Appeal from the District Court of the United States  
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

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**Brief of Appellant C. D. Johnson**  
**Lumber Corporation**

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No. 12914

In the

United States Court of Appeals  
For the Ninth Circuit

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C. D. JOHNSON LUMBER CORPORATION, a Corporation,  
*Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*  
KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION, a Corporation,  
*Appellee.*

---

Appeal from the District Court of the United States  
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

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Brief of Appellant C. D. Johnson  
Lumber Corporation

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**JURISDICTIONAL STATEMENT**

This is an action at law between citizens of different states in which the appellee Hutchens claims damages of \$75,974.71 against the appellant. (Pre-Trial Order, R. 9, 21) Judgment in the sum of \$46,500, together with plaintiff's costs and disbursements, has been entered

against the appellant based upon the verdict and a certain remittitur. (Order directing Entry of Judgment, R. 71) It is contended that the United States District Court of the District of Oregon has jurisdiction of this action upon the basis of the above facts, under 28 U.S.C.A., § 1332 (a) (1); and that this court has jurisdiction of this appeal under 28 U.S.C.A., § 1291.

### **STATEMENT OF THE CASE**

Dean Hutchens, appellee's decedent, was found dead alongside his truck on a log unloading dock owned by the appellant C. D. Johnson Lumber Corporation. (R. 9-11) The decedent had a contract with W. R. Francis, a logging operator, to haul logs from Francis' operation at an agreed rate per thousand board feet for the haul as compensation for the decedent's truck and for his services as driver thereof. (R. 13) Francis, in turn, had contracted with the appellant to cut and haul logs to Toledo for \$15.00 per thousand board feet net water scale (Defendant's exhibit 1, R. 280). The logs were scaled in the water. (R. 244-5) The decedent was in the process of unloading a log under Francis' contract with the appellant when he was killed.

The decedent was killed by being struck by the log carried on his truck while he was in a position between the trailer of his truck and a brow log at the water edge

of the dock. (R. 10) That position was directly in the path the log had to roll in being dumped into the water pursuant to appellant's contract with Francis. Francis reimbursed the appellant for wages paid the crane operator on the dock for the time the operator spend unloading logs brought in by Francis. (R. 279-80, 283-5)

The case arises under the Oregon Employer's Liability Act, O.C.L.A. § 102-1601—1606, which is a statute unique to Oregon and is preferred by claimants for wrongful death since it is not subject to the \$15,000 limit to recovery provided for by Oregon's wrongful death statute. O.C.L.A. § 8-903—4. Furthermore the Act limits the defense of contributory negligence and recovery is paid directly to the beneficiary without the necessity of passing through the estate. O.C.L.A. §102-1604, § 1606. (Text of the Act set out in Appendix)

The protection afforded an employee by the Oregon Employers' Liability Act is also distinct from that provided by workmen's compensation as to which Oregon has one of the usual type statutes. (O.C.L.A. 102-1701 *et seq.*) Before bringing this action the plaintiff as widow of the deceased claimed workmen's compensation on the theory that the decedent was an employee of Francis; the State Industrial Accident Commission rejected that claim. (R. 35, 98-99, 108) When this action was begun the plaintiff filed an election to seek recovery

against a third party (appellant here) and not his employer. (R. 3) This notice of election is required by the workmen's compensation statute. O.C.L.A. § 102-1729.

The logging contractor, Francis, was joined as a third party defendant in this action. On January 20, 1950, appellee Hutchens moved the court for an order that separate pre-trial conferences and separate trials be held in the principal and in the third party actions. (R. 4-6) On June 14, 1950 after pre-trial conferences had been had, the court entered an order that the issues between the appellee and appellant be segregated and that issues between appellant and third party defendant be reserved for a later disposition. (R. 8)

On May 9, 1950 the appellant moved the court for an order requiring the appellee to elect whether she would proceed on the theory that the decedent was an employee of the third party defendant, Francis, or of the appellant. (R. 7) Counsel for appellee stated at pre-trial conference on May 22, 1950, that they abandoned any contention that the decedent was an employee of the appellant in any way. (R. 109-110)

The case proceeded to trial before Judge Gus J. Solomon sitting with a jury on June 20, 1950. A verdict for \$68,377.20 in favor of the plaintiff was returned. (R. 54)



Thereafter appellant filed motions for judgment notwithstanding verdict of the jury and for a new trial. (R. 57-63) Subsequently the court filed an opinion stating that the verdict was excessive to the extent of \$21,877.20; and if appellee should file a remittitur of that amount, said motions of appellant would be denied and judgment entered on the reduced verdict. If no such remittitur was filed, then motion for new trial would be granted. (R. 76) In due course said remittitur was filed, and appellant's motions were denied and judgment was entered on the verdict as reduced being for \$46,500, together with the costs and disbursement of the plaintiff. (R. 71) Appellant then filed notice of appeal from said judgment and thereafter appellee appealed from said judgment to the extent that it was based on the remittitur. (R. 81, 87)

Five main questions are presented by this appeal. The first is presented by the first two specifications which, respectively, object to part of the charge given and to a similar instruction refused and is: must the injured person's employment status as an employee be found before the Act may be applied? The second question which is raised by the third specification is the refusal to admit in evidence a certain ruling of the Industrial Accident Commission.

The third question is dealt with by the Specifications

No. IV through VI and is: what is the effect on recovery under the Act if the injured person was violating certain statutory safety regulations? Specifications No. IV and V specify refused instructions while No. VI specifies the court's refusal to give judgment notwithstanding the verdict.

All the remaining specifications specify refused instructions. Specification X raises the question whether the Act applies here if there is no intermingling of employees, and involves a construction of the logging contract between "logger" and appellant. Specifications VII through IX raise the question of who is in charge as defined in the Act of the unloading operation and also involve a construction of the said logging contract.

### **SPECIFICATION OF ERROR I**

The District Court erred in giving an instruction which *totidem verbis* was:

"Your first inquiry therefore will be whether the work of the plaintiff's decedent — that is Dean Hutchens—was engaged at the time of the fatal accident involved risk or danger. If you find from a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time and place of the fatal accident involved risk or danger, then he was entitled to the protection and benefits of the Oregon Employers' Liability Act; \* \* \*

"Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by

W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger.

\* \* \*

"If the plaintiff failed to prove by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the accident, at the time and place of the accident, involved risk or danger, then your deliberations will be at an end and you will return a verdict for the defendant. On the other hand, if you find by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the fatal accident did involve risk or danger then the defendant C. D. Johnson Lumber Corporation was subject to the Oregon Employers' Liability Act and was under a duty to observe and carry out its provisions." (R. 297-299)

The grounds of objection urged at the trial to said instruction were:

"Now, then, with respect to the Court's instruction on the Employers' Liability Act as stated to the jury, that they were first to determine whether risk and danger was involved and if so the Act would apply, we would except to that because we feel that that omits the status of the decedent which in effect is along the same line that we have already dis-

cussed. That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

The Court: I know the instruction.” (R. 318)

\* \* \*

“The Court: You may have your exceptions.” (R. 320)

Said specification of error covers questions raised by Appeal Point 2.

### **SPECIFICATION OF ERROR II**

The District Court erred in refusing to give the following requested defendant’s instructions No. XV and XVII which totidem verbis were:

“I instruct you that if you find from the evidence that the deceased was an independent contractor or an independent subcontractor that this particular action cannot be maintained by the plaintiff and your verdict would be for the defendant. This particular law is designed to apply to employees only and not to independent contractors.” (No. XV)

“I instruct you that if you find from the evidence that under the Logging contract that it was the responsibility of the Logger to deliver the logs in the water, then, in that event, the logger would be in control of the log until it was dumped in the water and it would be up to the Logger to comply with the provisions of the E.L.A.” (No. XVII) (R. 44-5)

The grounds of objection urged at the trial to the District Court’s refusal to give the said instructions were:

“And also we ask the Court for an exception to the Court’s failure to give defendant’s requested instruction No. 17. I am aware of the fact that the Court has taken a different view of the law in the case than we do, and that instruction has to do with what we considered a defense in the event Hutchens was an independent contractor, it being our theory that if he were an independent contractor, if he was an independent contractor, that he would not be entitled to the benefits of the Act.

“The Court: You raised that in the question on the motion for a directed verdict?”

“Mr. Powers: Yes. The instructions go to the same. \* \* \* (R. 317)”

\* \* \*

“The Court: You may have your exceptions.”  
(R. 320)

The above specification challenges only the refusal of a single requested instruction which is erroneously referred to as “No. XVII.” From the context it is clear that appellant’s counsel had in mind appellant’s instruction No. XV rather than No. XVII. The context also makes it clear that the court so understood him. The court’s reference to appellant’s motion for a directed verdict make it indisputable that the court’s attention was drawn to the objected to matter and the grounds of defendant’s objections. (R. 292)

Said specification of error covers questions raised by Appeal Point 7. (Specifications of Error I and II

raise similar questions of law and are hence argued together below.)

**Point: The Oregon Employers' Liability Act only protects persons who are employees of someone and therefore the employment status of a claimant must be determined.**

Both defendant's requested instruction No. XV and the charge as actually given raise a single point of law: does the Oregon Employers' Liability Act apply irrespective of status of an injured person as an independent contractor if the work involved risk or danger? The court in its opinion denying defendant's motion for a new trial, states the basis of its view:

“Even though many of the cases refer to the fact that the injured workman was an employee, coverage under the Act was dependent upon whether an injured workman's duties required him to be about the machinery or hazardous work of the owner in the accomplishment of a common purpose in which the owner had an interest. In my opinion, it is immaterial whether an injured workman is required to be on the premises and perform work by reason of a master and servant relationship with either the owner or contractor or because of a contract with either of them. It is the nature of the work and not the technical legal status of the workman which controls.” (R. 74)

The appellant contends that this interpretation of the Act is contrary to the consistent construction established by the decisions. The trial court recognizes these

difficulties but attempts to distinguish the cases contrary to its view by saying that such cases merely refer (incidentally) to the fact that the injured workman was an employee.

There is no question that this Act adopted by initiative petition in 1910 is full of ambiguities which have had to be resolved by construction. For example, see *Saylor v. Enterprise Electric Co.*, 106 Or. 421, 212 Pac. 477. Now, however, the general pattern of interpretation of this unique Act has been established.

In interpreting the final "and generally" clause the following matters are no longer disputable. In *Coomer v. Supple Investment Co.*, 128 Or. 224, 274 Pac. 302, the court held that the Act applied to an *employee* of a customer of the defendant who was lawfully using the defendant's appliances.

The Coomer case followed the case of *Rorvik v. North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163. Coomer, *supra*, 228. Of the Rorvik case the court has said:

"In *Rorvik v. North Pacific Lumber Co.*, 99 Or. 58 (190 Pac. 331, 195 Pac. 163), we ruled that where an employee of one corporation employer is injured or killed by the failure of another corporation employer, although not an employer of the one injured or killed, to use the precaution required by the Employers' Liability Act, the employee or his beneficiary could maintain an action against the culpable employer under the provisions of the Employers' Liability Act."

The quotation continues:

“The opinion in *Clayton v. Enterprise Electric Co.*, 82 Or. 149 (161 Pac. 411), is authority for the same doctrine; and a statement in *Turnidge v. Thompson*, 89 Or. 637, 653 (175 Pac. 281), is an approval of the doctrine. It is not necessary at this time to re-examine the soundness of the doctrine mentioned; *for the decedent was not an employee of any employer.*” *Saylor v. Enterprise Electric Co.*, 106 Or. 421, 436, 212 Pac. 477. (Emphasis supplied)

The *Saylor* case itself applied the established constructional rule that the Act does not extend coverage to any person not “an employee of any employer.” The court set up its problem there as follows:

“If, however, the act with all its incidents governs no actions for damages except those brought by employees, then the judgment must be affirmed, *even though it is assumed that the decedent was engaged in work about the wire.*” *Saylor, supra*, 436. (Emphasis supplied)

Judgment for the defendant was affirmed and so the case must be understood as holding that the statute protects only employees or their substitutes by reason of death. The court in its analysis of the Act considered the phrase in the Act’s title “actions by employees against employers.”

“There is ample room for saying that ‘actions by employees against employers’ means by employees and, in case of death, their substitutes speci-



fied in the statute; but there is no room whatever for saying that the word 'employees' includes one who, though engaged in work, was not an employee of any person." Saylor, *supra*, 439.

The Rorvik case on which the court below relied was decided in accordance with the rule that the status of the injured person is an important consideration in applying the Act. By the time of the Rorvik case it had become well established that despite the broad language of the "and generally" clause that the Act did not extend coverage to the general public as such. *Turnidge v. Thompson*, 89 Or. 637, 175 Pac. 281. A sentence from the opinion in the Rorvik case neatly illustrates the restrictive interpretation which has been given this Act. The court after noting the intermingling of the employees of the two companies there states:

"The vessel could not be loaded in any other manner, and while deceased was in one sense a 'member of the public', in another he was an employee engaged in working about or in the vicinity of machinery, found by the jury to be dangerous, which brings the case squarely within the rule announced in *Clayton v. Enterprise Electric Co.*, 82 Or. 149 (161 Pac. 411)." *Rorvik v. North Pac. Lumber Co.*, 99 Or. 58, 78, 190 Pac. 331, 195 Pac. 163.

In the Clayton case the pattern of the Rorvik case existed: an employee of one employer succeeded in holding a related employer, that is, a pumping plant em-

employee held a power company liable under the Act. *Turnidge v. Thompson*, 89 Or. 637, 653, 175 Pac. 281; *Drefs v. Holman Transfer Co.*, 130 Or. 452, 455-6, 280 Pac. 505. Since the Clayton case the court has repeatedly followed its rule of construction limiting coverage to persons who were *employees* of some employer, and no case holding has gone beyond that. *Walters v. Dock Commission*, 126 Or. 487, 505, 266 Pac. 634, 270 Pac. 778; *McKay v. Pacific Bldg. Materials Co.*, 156 Or. 578, 592, 68 P. 2d 127.

This constructional pattern was recognized by this court in *Pacific States Lumber Co. v. Bargar*, 10 F. 2d 335, 336. This court further recognized that this construction is binding upon the federal courts. The issue here presented is then very narrow: does the Oregon Employers' Liability Act as construed by the Oregon courts require a determination that that workman is an *employee* of someone before the Act applies? Or stated in terms of this case's facts: is an independent contractor granted the benefit of the Act? In short, is the injured person's status one of the determinative facts of coverage by the Act?

The answer of the case law is clear and unambiguous: the Act does not apply to independent contractors since it is restricted to persons who are employees of someone. *Helzer v. Wax*, 127 Or. 427, 272 Pac. 556, is controlling here. In that case the court held that a person there

employed to remove garbage was an independent contractor and therefore not entitled to the benefits of the Act. That case requires a holding here that the court below erred in refusing to instruct the jury that it must determine the employment status of the decedent before the Act could apply here and, specifically, in refusing to instruct the jury that the Act does not apply to independent contractors.

The charge of the court below deprived the appellant of its theory of defense since under the charge it was immaterial whether the decedent was an independent contractor or not. The words of the court in the Helzer case demonstrate that such a view is erroneous. After having analyzed the facts there to determine that the plaintiff there was an independent contractor, the court states:

“We come now to the problem whether Section 6785, Or. L., which is a portion of the statute commonly referred to as the Employer’s Liability Act, includes one who is an independent contractor. If employees only are protected by the requirements of the act, the plaintiff cannot recover; but, if an independent contractor, whose duties require their performance in an elevator shaft, or in the presence of an instrumentality which creates a risk, or danger, is also embraced within the protective features of the act, the plaintiff was possessed of a cause of action by virtue of it, if the requirements of the act were breached by the defendant.

“3. It is well established that the plaintiff could

not recover under the act by virtue of his status as a member of the public: *Turnidge v. Thompson*, 89 Or. 637 (175 Pac. 281); *Malloy v. Marshall Wells Hardware Co.*, 90 Or. 303 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589); *Saylor v. Enterprise Electric Co.*, 106 Or. 421 (212 Pac. 477); *Brady v. Oregon Lumber Co.*, 117 Or. 188 (243 Pac. 96, 45 A.L.R. 812).

“We revert to the problem whether the foregoing circumstances accompanying his condition as an independent contractor place him in a more favorable situation.” Helzer, *supra*, 433-4.

The court then turns to an analysis of the case law and distinguishes *Rorvik v. North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163, saying:

“The distinction between that case and the present lies in the fact that in the one the injured party was an employee, while in the present he is not. A later case to similar effect is *Walters v. Dock Commission* (Or.), 270 Pac. 778. Counsel for plaintiff submits that one who has achieved the office of captain of a vessel is upon a higher industrial and economic level than another whose task is the humble one of gathering rubbish. Our duty, however, is confined to the function of interpretation. If we are correct in our understanding that the purpose of the act was to protect only employees, counsel’s argument loses its force when addressed to our ears. Our past decisions in expounding the meaning of the act make repeated use of the words employer and employee, and recovery has been uniformly confined to the latter. In *Clayton v. Enterprise Electric Co.*, 82 Or. 149 (161 Pac. 411), the deceased was an employee; the decision, however, contains words that might make it seem recovery was on a

different basis. A recent case restricting the operation of the act to the employee class is *Brady v. Oregon Lumber Co.*, 117 Or. 188 (243 Pac. 96, 45 A.L.R. 812).

**“4-6. Since the plaintiff was not an employee, but was an independent contractor, we conclude that he could not maintain this action as a beneficiary under the act.”** Helzer, *supra*, 437-8, (Last emphasis ours)

The Helzer holding has never been questioned, yet the court below asserted:

“It is the nature of the work and not the technical legal status of the workman which controls.” (R. 74)

If the court below is correct, it is difficult to understand why the Oregon court thought it necessary to devote over three pages of its eleven page opinion in the Helzer case to determining whether or not under the general principles of law the plaintiff was an independent contractor. (Pp. 430-433). Of the remaining eight pages of the opinion, about five are devoted to analyzing the law to reach the conclusion previously stated that the Act does not apply to the benefit of independent contractors. (Pp. 433-8).

If the distinction between an employee and independent contractor is purely formal, then a great many important distinctions in the law are formalities. The

difference between an employee and an independent contractor in the type of situations with which the Act deals is much more important than a distinction in such circumstances between a municipal "quasi-officer" or "pseudo officer" and a municipal employee. *Asher v. City of Portland*, 133 Or. 41, 284 Pac. 586.

The charge of the court specified as an error is in part as follows:

"Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger." (R. 298)

The error of the charge is clearly shown by a comparison with a statement of the court in the Helzer case. In the early part of that opinion, before having announced its conclusion that the Act does not apply to independent contractors, the court stated:

"If employees only are protected by the requirements of the Act, the plaintiff cannot recover; *but, if an independent contractor*, whose duties require their performance in an elevator shaft, or in the

presence of an instrumentality which creates a risk, or danger, *is also embraced within the protective features of the act*, the plaintiff was possessed of a cause of action by virtue of it, if the requirements of the act were breached by the defendant." *Helzer v. Wax*, *supra*, 433 (Emphasis supplied)

It is apparent that the court below has restricted its charge to only one element of the law: did the decedent's work involve risk or danger? The court in its charge ignored the other element of the law: the status of the decedent as employee or independent contractor. Defendant's requested instruction XV states that requirement simply and clearly. Since *Helzer v. Wax*, 127 Or. 427, 272 Pac. 556, is law, some such instruction had to be given. None was, and the appellant was thereby deprived of its theory of defense.

### **SPECIFICATION OF ERROR III**

The District Court erred in refusing to admit in evidence a ruling of the Oregon State Industrial Accident Commission which was as follows:

"That the claim of Mrs. Kathleen Hutchens, widow of the deceased, Hollis Dean Hutchens, should be and the same is hereby rejected as there is no evidence that said deceased, Hollis Dean Hutchens, was employed subject to the provisions of the Oregon Workman's Compensation Law at the time of said accidental injury causing his death." (Defendant's Exhibit 4, see also R. 35)

The grounds urged at the trial to the exclusion of the said evidence were as follows:

“Mr. Powers: \* \* \* I want to offer in evidence that ruling from the Industrial State Accident Commission.

“Mr. Babcock: To which we will object, your Honor, and if there is going to be argument.—

“The Court: Objection sustained.

“Mr. Powers. I see.” (R. 288-9)

\* \* \*

“Mr. Powers: I wanted to put in all the exhibits, and I mentioned them one by one, and I assume I have an exception to the ones not admitted?

“The Court: You have.” (R. 289-90)

Said grounds against exclusion had previously been presented in great detail in pre-trial conference in connection with allowing appellant to plead said ruling in the pre-trial order:

“The Court: But the question is, may something be included in the pre-trial order that is absolutely inadmissible at the trial? Why would the determination by the Industrial Accident Commission have any bearing upon this proceeding?

“Mr. Powers: Well, they have filed in here an election with the Industrial Accident Commission that is in the court records, and they are proceeding on that basis, so it has all the bearing in the world here.

“The Court: You mean to say that if the State Industrial Accident Commission holds that Hutchens



was an independent contractor that that is binding upon him in this proceeding or is any evidence?

“Mr. Powers: I think it would be binding unless he took an appeal from it.

“Mr. Babcock: May I call your Honor’s attention—

“Mr. Powers: I think it would be binding unless there is an appeal. They have the right of appeal. Whether they have taken an appeal—we don’t know what they do or propose to do.

“Mr. Babcock: May I call your Honor’s attention to the provisions and the language of the Code in 120-1729 where it is stated that in any third party action brought pursuant to the provisions of this Act the fact that the injured workman or his beneficiaries are entitled to or have proceeded shall not be pleaded or admitted. I think under the provisions of the Code it is clearly inadmissible.

“Mr. Powers: This is in the nature of a supplemental pleading. You have stated what you contend, and it has been held that these determinations of the Accident Commission become binding on the Court if there is not an appeal taken from them. I am not so sure about Oregon, but I do know there are cases in Oregon.

“The Court: Their act is considerably different from ours, isn’t it?

“Mr. Powers: It is different, but the administration of it is probably the same. It proceeds as an administrative body. In that respect it is similar, very similar. It certainly can’t prejudice anybody to have it in there.

“The Court: Well, I don’t think it should go in there. I think if you want to under your contentions of law that it might go in if it goes in any place.

“Mr. Powers: How would we prove it? Suppose we want to make a showing, an offer of proof. The contentions of law I think should be determined from what your proof is, and there are a good many. As I started out, there are a good many things I don’t think should be in here as far as the plaintiff’s contentions are concerned, and I say since they put them in I have got to answer them, and I have answered them, and to let him say who was complying with the safety rule, and so on, and that he was an employee—now, in face of the fact that it has actually been determined by the Accident Commission that he was an independent contractor—I don’t see how I could just sit silently by.

“The Court: Well, I—

“Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

“Mr. Powers: I don’t know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

“Mr. Babcock: I don’t contend, except that that fact is entirely immaterial to this proceedings.

“Mr. Powers: You were there and we weren’t.

“Mr. Babcock: If you want a copy of the Commission’s order I should be glad to make it available to you.

“Mr. Powers: Has it become final?

“Mr. Babcock: Yes; it is under appeal.

“Mr. Powers: You have taken an appeal?

“Mr. Babcock: Yes.

“The Court: What is the order?

“Mr. Babcock: The order is that the claim of Kathleen Hutchens, widow, should be and the same is hereby rejected, and there is no evidence that said the deceased was employed subject to the provisions of the Oregon Workmen’s Compensation Act at the time of said accidental injury causing his death.

“Mr. Powers: And you, of course, will stipulate that Francis was subject to the Workmen’s Compensation Act at the time.

“Mr. Babcock: That’s right.

“Mr. Powers: And you applied for compensation under the theory he was an employee of Francis?

“Mr. Babcock: That’s right.

“Mr. Biggs: Isn’t the official determination of an administrative body admissible in evidence, though not binding on the Court, where the claimant and his working situation is the very same matter before the administrative body as is before the Court? Isn’t the administrative body’s decision admissible in evidence for whatever weight the Court may give it, and don’t Court incline to give considerable weight to such rulings? That is the general rule. I don’t know why it wouldn’t be admissible.

“Mr. Babcock: That isn’t my understanding of it, and, in addition, here, you have the actual provisions of the Code that that fact isn’t to be brought into the case as far as the jury is concerned—at least whether he is or may be entitled to compensation under the State Act.

“Mr. Powers: We would like to have it stay in if we can.

“The Court: I think I am going to let it stay in despite the fact that I have grave doubts as to whether or not you may introduce any evidence on it, but I think the pre-trial order should contain all of the contentions of the parties.” (R. 96-9)

The above specification of error covers the questions raised by Appeal Point 3.

**Point: A ruling by the Industrial Accident Commission as to decedent's employment status was admissible in this action as evidence of decedent's employment status.**

The appellant was entitled to the application of the most favorable rule as to admission of evidence whether it was the rule in the Oregon courts or in the courts of the United States. Rule 43 (a), Civ. Proc. R.; *Reck v. Pacific Atlantic Steamship Co.*, 180 F. 2d 866.

One of the Washington cases referred to by counsel for appellant at the pre-trial conference is: *Prince v. Saginaw Logging Co.*, 197 Wash. 4, 84 P. 2d 397. In that case plaintiff's claim for workmen's compensation was rejected by the Department of Labor and Industries. One reason for the rejection was the finding that at the time of injury claimant was not in the course of employment. Claimant accepted the decision and instituted a negligence action against his employer. Among the defenses advanced was that he was in the course of his employment and therefore barred by the workmen's compensation law.

Plaintiff relied on the administrative decision. The superior court in a memorandum decision asserted that

the injury occurred in the course of his employment and that the administrative decision to the contrary was not res adjudicata as to the employer and hence dismissed the action. The supreme court reversed holding both the employee and employer bound by the administrative determination. In the case at bar the court refused to even admit the administrative ruling in question. See also *LeBire v. Dept. of Labor & Industries*, 14 Wash. 2d 407, 128 P. 2d 308.

In *Franzen v. E. I. DuPont De Nemours & Co.*, 146 F. 2d 837, a witness' deposition before a state Workmen's Compensation Board was held properly admitted. In that case suit was brought in the New Jersey Federal District Court under the Employer's Liability Laws of Louisiana. The deposition had been taken in connection with plaintiff's claim before New Jersey Workmen's Compensation Board for compensation under the law of New Jersey.

In *The Abangarez*, 60 F. 2d 543, the court held that the findings of a board of local inspectors as a collision between a steamship and a submarine were admissible as being in the nature of public documents and therefore within that exception to the hearsay rule. In that case the court had to determine which vessel was at fault in the collision yet it admitted the findings the administrative board on the same question.

The analogy to the case at bar is clear since here under appellant's theory the court had to instruct the jury that the employment status of the decedent had to be determined before the Oregon Employers' Liability Act would apply. In fact, the court refused to properly instruct the jury; and the text of the rejected industrial accident ruling shows that this failure of the court to properly instruct the jury as to employment status was prejudicial error.

In *United States v. Mid-Continent Petroleum Corporation*, 67 F. 2d 37, the court held that enrollment records of Indian tribes made by a quasi-judicial tribunal were admissible in a suit involving title to certain oil bearing Indian land. Such records involved an adjudication as to what persons were members of the tribe. This adjudication was admitted not to show the quantity of Indian blood, but the relationship of the parties to the Indian who had died owning the oil land in litigation. There is an analogy between this admission of a quasi-judicial commission's determination of family relationships in a lawsuit involving land title, and the admission of a quasi-judicial commission's determination of employment status in a personal injury suit under a statute generally protecting workingmen.

The problem here presented is whether an administrative determination of a fact contested in a regular

lawsuit arising under a distinct statutory provision is admissible in that regular lawsuit. The answer is yes, according to a series of cases arising out of the interaction of the World War I war risk insurance and compensation or pension statutes.

In the case of *McGovern v. United States*, 294 Fed. 108, *writ of error dismissed in* 267 U.S. 608, 69 L. Ed. 812, 45 S. Ct. 351, *affirmed in* 299 Fed. 302, *writ of error dismissed in* 268 U.S. 708, 69 L. Ed. 1169, 45 S. Ct. 515, the plaintiff claimed that he had total permanent disability within the meaning of section 400, Act Oct. 6, 1917, 40 Stat. 409. (Article IV, War Risk Insurance.) Plaintiff sued to enforce the contract of insurance; and the court held that the determinations and actions of the Veterans' Bureau were admissible though such determinations "may have been more in relation to compensation than to insurance" since "the import of the term 'total permanent disability' is like in both aspects." (Apparently the compensation (pension) proceedings had arisen under Article III, Act of Oct. 6, 1917, 40 Stat. 405.)

The cases of *United States v. Vance*, 48 F. 2d 472, and *United States v. Smith*, 55 F. 2d 141, also involved the use of compensation disability ratings in a regular lawsuit to enforce a war risk insurance policy. See also *United States v. Dougherty*, 54 F. 2d 721. In first two

cases the Veterans' Bureau's compensation (pension) ratings were held admissible on the question of the lapse of the policy under section 305, World War Veterans' Act, June 7, 1924, 38 U.S.C.A. sec. 516. See Appendix for pertinent text.

The leading case, *McGovern v. United States, supra*, was criticized in *Third Nat. Bank & Trust Co. v. United States*, 53 F. 2d 599. Whether or not that criticism is sound in view of the trend of law in evidence on this point, it is to be noted that *United States v. Smith, supra*, was decided by this court after the Third National Bank case. In a later case, *Quinn v. United States*, 58 F. 2d 19, the Third Circuit held that the Veteran's Bureau's disability ratings and other rulings and findings of the directors and bureau were admissible to show service connection of the plaintiff's disabilities.

The analogy of these veterans' cases to the case at bar is clear and obvious. Both the Oregon Employers' Liability Act and the Workmen's Compensation Act relate generally to the injuries of workmen. The Oregon Industrial Accident Commission determined that the decedent was not covered by the Workmen's Compensation Act and the inference is clear that he was not an employee but an independent contractor. Appellee's counsel conceded that decedent was determined by the Commission to be an independent contractor. (R. 98)



Under the circumstances of this case there were no other possibilities. The Act is generally restricted to workmen of covered employers, and the term workman is defined as "any person who shall engage to perform his or her services, subject to the direction and control of an employer." O.C.L.A. 102-1703, § 102-1728.

The ruling was an official record of the Industrial Accident Commission and should have been admitted. O.C.L.A. 102-1773 provides in part:

"The commission shall have full power and authority to hear and determine all questions within its jurisdiction. Whenever the commission has made any order, decision or award pertaining to any claim, it shall promptly serve the claimant with a copy thereof by mail \* \* \* "

According to Wigmore the general rule as to official records is:

*"Wherever there is a duty to record official doings, the record thus kept is admissible."* \* \* \*

\* \* \*

"Further, it may safely be laid down, as a general principle, that *wherever there is a duty to do*, then there is *also an implied duty to record* the things done." 5 Wigmore, *Evidence*, (3rd Ed. 1940) sec. 1639.

Under that jurisdiction the Commission heard and rejected the claim of the decedent's widow for death

benefits. Its ruling in writing regularly made should therefore have been admitted.

To have admitted this evidence would have been to conform to the trend in the law as shown by Rule 515 of the American Law Institute Model Code of Evidence. (Text of rule set out in Appendix.) The Workmen's Compensation statute does not specifically privilege the ruling from disclosure. Here the court below should have found that the writing was made by the Commission in performance of its office, and that it was the function of the Commission to investigate the "condition" of the decedent's employment status and "to make findings or draw conclusions about it." A.L.I. Rule 515 was considered with approval in *Vanadium Corporation v. Fidelity & Deposit Co.*, 159 F. 2d 105, where the court approved admission of certain interdepartmental communications showing departmental willingness to approve the sale of certain mining leases.

Finally, it is well established in Oregon that expert opinion evidence may be received on the very issue before the jury, *Schweiger v. Solbeck*, 52 Or. Adv. Sh. 611, 626, 230 P. 2d 195. In Washington in a case arising under its factory act the plaintiff complained that he had been injured by certain industrial gases. A cause of the injury was alleged to be poor ventilation. The court held it

proper to admit the opinion reports of the factory inspectors on that question. *Grant v. Fisher Flouring Mills Co.*, 190 Wash. 356, 68 P. 2d 210. These cases suggest that the ruling of the accident commission here should have been received in evidence.

### SPECIFICATION OF ERROR IV

The District Court erred in refusing to give defendant's requested instruction No. XXIV which totidem verbis was:

"I instruct you that the Logging Safety Code of the State of Oregon prohibits anyone from going between a load of logs and a brow log and therefore if you find in this case that the deceased went between a log load and the brow log then he would be in violation of this provision of the safety code and you are further instructed that a violation of this provision of the safety code would be negligence as a matter of law and if you further find that this negligence was the sole proximate cause of the accident and death then in that event your verdict would be for the defendant and against the plaintiff." (R. 48)

The grounds of objection urged at the trial to the District Court's refusal to give said instruction were:

"MR. POWERS: Well, then, we would like an exception, if the Court please, to the Court's failure to give requested instruction No. 23, \* \* \*, and also exception to the Court's refusal or failure to give requested instruction No. 24, which also has to do with

the safety code and which forbids a person from going between the truck and the brow log.” (R. 318)

The said specification of error covers questions raised by Appeal Point 5.

**Point: Violation of the Logging Safety Code of the State of Oregon is negligence as a matter of law in Oregon.**

It was an agreed fact set out in the pre-trial Order that:

“Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log.” (R. 10)

The nature of a logging truck is such that all except the front end of the log load is on the trailer. Under the agreed facts it is then clear that the decedent was killed while between his log load and the brow log of the dock.

To be there was a violation of section 17.15 of the Logging Safety Code of the State of Oregon:

“Men shall not go between the brow log and a load of logs.” (Plaintiff’s Exhibit 18, P. 76)

Another section of the Logging Code, section 17.13, makes it clear that there is no exception to the first

rule for a log hauler unloading his logs. That section states:

“Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading.” (Plaintiff’s Exhibit 18, P. 76)

In the unloading here concerned, the load of logs were to roll towards the brow log, yet the decedent went into that forbidden area.

The agreed facts show a violation of the Logging Safety Code. The question presented by the specification of error is then: what is the legal effect of a violation of the Logging Safety Code?

The introduction to the Code states:

“The contents of this book are a part of the safety laws of Oregon, the enforcement of which becomes the responsibility of the Accident Prevention Division of the State Industrial Accident Commission” (Plaintiff’s Exhibit 18, P. 1)

The enforcing agency thus construes this Code as a “safety law.” That interpretation is entitled to serious consideration. *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 512, 286 Pac. 527. See Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon*, 29 Or. L. Rev. 1, 8-11 (1949).

The Oregon court agrees that the Logging Safety

Code has the effect of law. In the case of *Varley v. Consolidated Timber Co.*, 172 Or. 157, 165, 139 P. 2d 584, after quoting at length from the Logging Safety Code, the court said:

“The foregoing rules and regulations have the effect of law §102-1241, O.C.L.A.; and any violation thereof is punishable by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment, in the discretion of the court: §102-1243, O.C.L.A.”

O.C.L.A., §102-1241, provides:

“Every order of the commission, general or special, its rules and regulations, findings and decisions, made and entered under the safety provisions of this act shall be admissible as evidence in any prosecution for the violation of any of the said provisions and shall, in every such prosecution, be conclusively presumed to be reasonable and lawful and to fix a reasonable and proper standard and requirement of safety, unless, prior to the institution of the prosecution for such violation or violations, proceedings for a rehearing thereon or a review thereof shall have been instituted as provided in section 102-1238, and not then finally determined.”

The general rule is that violations of such regulations as the Logging Code is some evidence of negligence. 1 Shearman and Redfield, *Negligence*, (Revised Ed. 1941) sec. 18. In Oregon the statute has gone further and stated that the Commission's general safety rules are

“conclusively presumed” to be “a reasonable and proper standard and requirement of safety.”

This conclusive presumption is not restricted to prosecutions under the provision of that particular act. *Varley v. Consolidated Timber Co.*, *supra*. The Varley case was an ordinary negligence action for injuries yet the court stated that in that case the Logging Code had the effect of law. (P. 165) Compare *Kuntz v. Emerson Hardware Co.*, 93 Or. 565, 577, 184 Pac. 253. (Certificate of Labor Commissioner as to compliance with Factory Act held admissible to show compliance with Employers' Liability Act.)

Since there is a conclusive presumption that the Logging Code sets the proper standard of safety, falling short of that standard must be conclusively presumed to be negligent. The agreed facts show that the decedent failed to conform to the standard of safety required by the Logging Code. That failure was negligence as a matter of law.

The Oregon court in *Fitzgerald v. Oregon-Washington R. & Nav. Co.*, 141 Or. 1, 13, 16 P. 2d 27, an Employers' Liability Act case, has taken a very strong position:

“8. A violation of a statutory mandate for the safety of workmen constitutes negligence without regard to the applicability or non-applicability of the penal clause of such statute.”

The safety statute there involved, Section 49-1202, Oregon Code 1930, (presently O.C.L.A. § 102-1202) relates to the lighting of places of employment.

That is the position the appellee took at the pre-trial conference:

“The Court: What is your view as to whether or not the violation of the Safety Code provision or any administrative ruling would be negligence or is evidence of negligence? Is there any dispute about that?

“Mr. Babcock: It is our understanding and our position that it does constitute negligence per se.”  
(R. 105)

The remainder of the requested instruction to the effect that if the jury should find this negligence was the sole proximate cause of the accident then the verdict should be for the defendant is within the bounds of the instruction approved in *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223. See also *Vanderflute v. P.R.L & P. Co.*, 103 Or. 398, 205 Pac. 551.

The trial court's refusal to give defendant's requested instruction XXIV was highly prejudicial to the defendant since the defendant was thereby deprived of an important defense. If the sole proximate cause of the accident was the decedent's negligence as a matter of law in venturing where the Logging Safety Code forbade



him to be, then it is obvious that the plaintiff cannot recover. The refusal to give the requested instruction prevented the jury from finding that admitted actions of the decedent which the State of Oregon has formally declared to be negligent were the sole cause of his own death.

### **SPECIFICATION OF ERROR V**

The District Court erred in refusing to give defendant's requested instructions No. I through IX which totidem verbis were:

#### **I.**

"The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (1) which appears on page 8 in the pre-trial order. The E. L. A. is designed to require safe appliances and devices and this specification would not be a violation of the Act. There is no evidence to support the claimed violation and moreover plaintiff seeks to recover solely under the Act and the Act itself sets the standard of care required. A violation of some other law or code as claimed here can not be ingrafted upon the E. L. A. In short, the provisions of the Act cannot be enlarged; the remedies are entirely different. The E. L. A. strips the employers of his defenses; the other law does not.

#### **II.**

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (2) for the reasons stated above with respect

to specification of negligence (1); and further, there is no evidence that this would be a violation of the E. L. A. and there is no requirement by the Act at all that signals should be given by certain designated persons.

### III.

The Court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (3). There is no evidence to support a violation of the E. L. A. with respect to this specification. There is nothing in the Act to require any particular number of workmen. The contract and other evidence shows that it was the obligation of the Logger to deliver the logs in the water. This specification of negligence is in part a repetition of specification of negligence (1).

### IV.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (4) for the same reasons stated with respect to withdrawal of plaintiff's specification of negligence (1).

### V.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (5). First for the reason that there is no evidence under this specification to constitute a violation of the E. L. A. and no evidence to support any lack of notice to the decedent as it was his duty to give the signal to move the log and to take a safe place while that operation was being carried on.

### VI.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of neg-

ligence (6) for the same reason stated with respect to specification of negligence (1); and moreover, the Sawmill Safety Code could have no application in this matter in that there was no sawmill involved.

## VII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (7) for the reason there is no evidence to support a violation of the E. L. A. That this specification is merely a repetition of other specifications above.

## VIII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (8) in that there is no evidence to support a violation of the E. L. A. and further for the same reasons as expressed above particularly with respect to the request for the withdrawal of specification of negligence (1).

## IX.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (9) on the ground and for the reason that this specifies a breach of the common law and not a breach of the E. L. A. There is no evidence under this specification of negligence to show any violation of the E. L. A." (R. 40-3)

The grounds of objection urged at the trial to the District Court's refusal to give the said instructions were:

"MR. POWERS: May it please the Court, the defendant would request exception, if the Court please,

to the failure to give defendant's requested instructions No. 1 through 9. They were requests that the specifications of negligence be withdrawn from consideration of the jury, and the reasons stated as to why we thought they should be withdrawn are stated in the requested instructions, your Honor, so the reasons given there I will repeat here without reading them because they do appear there." (R. 316-7)

"THE COURT: You may have your exceptions." (R. 320)

Said specifications of error covers questions raised by Appeal Point 6.

### **SPECIFICATION OF ERROR VI**

The District Court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict. Said motion was made in the following form:

"Comes now defendant C. D. Johnson Lumber Corporation and moves the court for the entry of judgment in its favor notwithstanding verdict of the jury on the grounds and for the reasons following:

(1) There is no specification of negligence in the pre-trial order which would constitute violation of the Employers' Liability Act of the State of Oregon.

(2) There is no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Employers' Liability Act.

(3) The only possible evidence of negligence in this case would be for common law negligence or possibly a breach of some Oregon statute which is not part of the Oregon Employers' Liability Act.

(4) There is no evidence in this case to show any violation on the part of this defendant of the Employers' Liability Act in that there is no evidence of any failure to use every device, machinery and other apparatus as required by the Oregon Employers' Liability Act.

(5) There is no evidence showing that the status of the decedent at the time and place of his death was such as to bring him within the class of persons entitled to protection under the Employers' Liability Act.

Wherefore, defendant asks that judgment now be entered in its favor and plaintiff's complaint dismissed." (R. 57)

The District Court entered an order denying motion for judgment notwithstanding the verdict which omitting formal parts was totidem verbis:

"It Is Hereby Ordered that the said Motion for Judgment Notwithstanding Verdict of Jury be and the same hereby is denied." (R. 69-70)

Said specification of error covers questions raised by Appeal Point 1. (Specifications of Error V and VI raise similar questions of law and are hence argued together here.)

**Point: Decedent was killed in an unsafe place where he was forbidden by law to be and therefore it can not be claimed that the appellant was negligent in failing to provide him with a safe place to work since a safe place was available to him.**

Specification VI contends that the Oregon Employers' Liability Act was inapplicable under the circumstances of this case and therefore there could be no competent evidence of any violation of the said Act. Specification V contends that it was error for the Court to refuse to withdraw from the consideration of the jury all of plaintiff's specifications of negligence on the ground that there was no evidence to support any of the said specifications as alleged violations of the Act.

The ultimate question presented by these two specifications of error is: was there any violation of the Act by the defendant when the decedent placed himself in an unlawful place and was killed there while doing an unlawful act? In short, was there any failure on the part of the defendant to provide the decedent with a safe place to work?

The decedent was provided with a safe place to work which he left for an unsafe place where he was forbidden by law to be. Defendant moved to withdraw all specifications of negligence under the Act, leaving only the general statement that defendant failed "to furnish

the decedent, Dean Hutchens, with a safe place of employment and failed to use every device, care and precautionary precautions practicable to protect the safety of the decedent.” (R. 18) The statement as to precautions is a paraphrase of the Act (O.C.L.A. §102-1601), and only indicates the standard of care required as to providing a safe place to work. This Court has treated the requirement of a safe place to work under the Act and necessity of taking precautions under the Act as equivalent expressions. *Crown-Willamette Paper Co. v. Newport*, 260 Fed. 110, 113.

The Oregon court concurs:

“The requirements of the Act are simply expressions in detail of the duty thus enjoined (provision of reasonably safe place to work), and are not satisfied with less than continual vigilance according to the standard of the enactment.” *Dickerson v. Eastern & Western Lumber Co.*, 79 Or. 281, 287, 155 Pac. 175. (Insertion added)

If a safe place to work is furnished, the specified requirements of the Act are met. Any alleged necessary precautions are immaterial if a safe place to work is in fact furnished, and hence evidence with respect to such precautions is not competent to show any violation of the Act. This view is supported by authority previously cited, and it is also supported by reason. It is easy to see that there is no violation of the Act by the employer if

an employee deliberately inserts his hand into a machine by pushing it around a properly designed guard. It should be no less clear that there is no violation of the Act by the employer if the employee deliberately violates rules laid down for safe operation.

### **DECEDENT WAS KILLED IN AN UNLAWFUL PLACE DOING AN UNLAWFUL ACT**

The rule here is laid down, not simply by the employer, but by the State of Oregon acting through the Industrial Accident Commission. The rule here is laid down by the Oregon Logging Safety Code which prohibits men from going between the brow log and a load of logs. That prohibition has the effect of law. *Varley v. Consolidated Timber Co.*, 172 Or. 157, 165, 139 P. 2d 584.

O.C.L.A. §102-1236 required the decedent to comply with that rule:

“Every employer, employe and other person shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in connection with the matters herein specified, or in any way relating to or affecting safety of employments or places of employment, \* \* \*.”

In fact, he did not comply with that rule. It was an agreed fact that the decedent was killed “while he was



in a position between the trailer of the truck and the brow log.” (R. 10) Testimony at the trial sustains the proposition that the decedent went between the brow log and his log load. (R. 128-9) Irrespective of any question of negligence the decedent committed an *unlawful* act in going between the load and the brow log.

For that act the decedent could have been punished by a fine of not more than \$100.00, or by imprisonment in the county jail for not more than six months; or by both fine and imprisonment:

“Every violation of the provisions contained in sections 1, 2, and 3 of this act (§§ 102-1228—102-1230, herein), or any part of portion thereof, by any person, firm or corporation is a separate and distinct offense, and, in case of a continuing violation thereof, each day’s continuance thereof shall constitute a separate and distinct offense. Any person violating any of the provisions contained in sections 1, and 3 of this act (§§ 102-1228—102-1230, herein), or any part or portion thereof (or any lawful order, rule or regulation of the commission adopted or promulgated in accordance with the provisions of this act shall be punished by a fine of not more than \$100, or by imprisonment in the county jail for not more than six months; or by both such fine and imprisonment in the discretion of the court. Justice and district courts shall have concurrent jurisdiction with the circuit court for the prosecution and punishment of all crimes committed pursuant to or contrary to the provisions of this act.” O.C.L.A. § 102-1243.

The decedent could have also been fined and imprisoned for another act. If the decedent had any business at all being between the load and the brow log, it was to do an unlawful act. The only business he might have had there was the release of his load. Yet section 17.13 of the Logging Safety Code provides:

“Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading.” (Plaintiff’s Exhibit 18, P. 76)

### **EFFECT ON RECOVERY OF BEING INJURED DOING AN UNLAWFUL ACT**

The title of the Oregon Employers’ Liability Act is as follows:

“A BILL to propose by initiative petition a law providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.” *Turnidge v. Thompson*, 89 Or. 637, 643, 175 Pac. 281.

The court in that case states at page 651:

“Moreover, since every act must have a title expressing the subject matter, the title necessarily becomes a part of the act and offers valuable help in construing the act and determining the legislative intent: *State v. Robinson*, 32 Or. 43, 46 (48 Pac. 357).”

One of the three main purposes of act is to provide for the safety of persons in relation to specified machinery or situations. The remaining two main purposes, defining the liability of employers and declaring what shall not be a defense, present certain similarities to the various workmen's compensation acts. Under those acts many cases have arisen concerning an employee's right to compensation when he is injured in a place where he is forbidden by a safety rule or statute to be. Although for most purposes the Oregon Employers' Liability Act is unique, this particular line of cases should be applied here because the problem is analogous. *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 149, 140 Pac. 64, 144 Pac. 569.

The problem herein presented is created by the enactment in 1920, nine years after the enactment of the Oregon Employers' Liability Act, of a general safety statute authorizing the promulgation of industry safety codes having the force of law. O.C.L.A. § 102-1228—1251. The precise question is: does the failure of a workman to abide by a safety code having the force of law

under the 1920 statute relieve the employer of liability under the 1911 statute where the workman would not have been injured but for his violation of the safety code? That question is open, but compare *Kuntz v. Emerson Hardware Co.*, 93 Or. 565, 577, 184 Pac. 253, where a certificate of the Labor Commissioner as to compliance with Factory Act was held admissible to show compliance with the Employers' Liability Act.

In the case of *Fortin v. Beaver Coal Co.*, 217 Mich. 508, 187 N.W. 352, 23 A.L.R. 1153, a workmens' compensation case, a miner was killed jumping across the sump at the bottom of a shaft instead of passing around it as required by a mine safety statute and the court held that his dependents could not recover since he was guilty of a misdemeanor in jumping. That principle should be applied here because the Legislature in requiring employers to make operations safe by various devices would not have contemplated holding the employer for injuries incurred by workmen in violating other rules for safe operation made by the Legislature's representative, the State Industrial Accident Commission.

The integration of the 1911 safety appliance act with the 1920 safety code act should be even closer than a mine safety act with a compensation statute whose primary aim is compensation rather than safe operation.

The Oregon Employers' Liability Act is not only remedial, it is preventive. Its outstanding purpose is to protect employes from injury. *Smith v. Shevlin-Hixon Co.*, 157 F. 2d 51, 54.

The principle of denying recovery to a workman doing a forbidden act is also applied in Michigan where only the employer's instructions prohibited the act: entering a grain bin too soon after fumigating gas crystals had been placed there. The court said:

"A prohibited risk, when voluntarily assumed, with knowledge of easily apprehended fatal consequences is not an incident of employment, and an injury, so received, is not an accident arising out of and in the course of employment." *Waldbauer v. Michigan Bean Co.*, 278 Mich. 249, 254, 270 N.W. 285.

Many cases might be cited to illustrate the principle that doing an act prohibited either by employer's rule or by statute may bar a compensation award; the following are some of the more closely analogous cases: *Walcofski v. Lehigh Val. Coal Co.*, 278 Pa. 84, 122 Atl. 238 (recovery denied where miner entered section of mine marked "gas" contrary to mine safety law); *Jenczewski v. Aluminum Co.*, 199 App. Div. 156, 191 N.Y.S. 392 (dicta that no award could be made if workman was injured when contrary to orders he entered a prohibited pot-line area); *Joseph Fournier's Case*, 120 Me. 236, 113

Atl. 270, 23 A.L.R. 1156 (workman injured when being hoisted contrary to instructions denied compensation).

The question of the effect of going into or remaining in a prohibited place is annotated at: 23 A.L.R. 1172, 26 A.L.R. 167, 58 A.L.R. 201, 83 A.L.R. 1217, and 119 A.L.R. 1413. Each case is of course set in a statutory context of whether, for example, the forbidden act is "intentional or wilful misconduct" or "arises out of and in the course of the employment," but these specific provisions do not prevent the principle announced from being applicable in the case at bar. That principle is: conduct made criminal by law is a bar to compensation for injuries incurred as a result of such conduct.

The words of the Oregon court in regard to the interrelationship of parts of the Oregon Employers' Liability Act, state the controlling principle here:

"4. It seems evident that one who has violated a statutory duty can not have a statutory right of action to secure redress." *Schmidt v. Multnomah Opr. Co.*, 155 Or. 53, 67, 61 P. 2d 95.

## **DECEDENT WAS FURNISHED A SAFE PLACE TO WORK**

To summarize there was no competent evidence of any violation of the Oregon Employers' Liability Act in this case because the decedent was furnished a safe place to work. He could have stood clear of the log's path

as Witness Vincent did. (R. 119-120) An inspection of plaintiff's exhibits 3 through 7 and 13 through 14 will confirm the fact that places of safety were available to the decedent which he did not utilize. (R. 113-8) The plaintiff does not claim that there is any defect of equipment here. (R. 237)

The purpose of the Act is achieved when the workman is provided with a safe place to work; the specific requirements of the Act are only means to that end. Here a safe place to work was provided but the decedent did not use it, and the Oregon Employers' Liability Act does not go so far as to require the employer "to supervise every detail of the labor of each employee in the ordinary course of work." *Van Norden v. Chas. R. McCormick Lumber Co.*, 17 F. 2d 568, 569.

The analogous case of *Jackson v. Oregon Lumber Co.*, 152 Or. 200, 52 P. 2d 189, arising under the Oregon Employers' Liability Act, supports that conclusion. There the decedent log truck driver was killed on an unloading dock apparently after he had loosened the chains holding his load of logs. (P. 201) The unloading dock there was cramped, being constructed by planking one track of a narrow gauge railway. In that case plaintiff also alleged a failure to furnish a safe place to work. The court held that there was no evidence that the failure to furnish a smooth and level place to unload the logs

was the proximate cause of deceased's death. If an unloading dock is an unsafe place to work as plaintiff seems to contend, then it is noteworthy that the Oregon court did not so intimate when the plaintiff's specific allegation of a rough unloading place was found to be unsupported in the Jackson case.

### **SPECIFICATION OF ERROR VII**

The District Court erred in refusing to give defendant's requested instruction No. XIX which totidem verbis was:

"I instruct you that if you find from the evidence that the truck driver was in charge of the unloading operation, then, in that event, it was up to the truck driver to see that the provisions of the E.L.A. were complied with." (R. 45)

The grounds of objection urged at the trial to the District Court's refusal to give the said instruction were:

"Mr. Powers: \* \* \* And we ask for an exception, if the Court please, to the Court's refusing to give requested instruction No. 19 of the defendant. I am not sure—I don't think that you told the jury that if the driver was in charge of the truck and the unloading operations that then the Act would not be applicable because he himself would have the responsibility for seeing that the provisions would be enforced.



“The Court: Mr. Babcock took exception to that because he thought I did give it. (R. 317-8)

\* \* \*

“The Court: You may have your exceptions. (R. 320)

Said specification of error covers questions raised by Appeal Point 4.

**Point: The decedent was in charge of the unloading operation within the meaning of the Employers' Liability Act and hence was responsible for compliance with the Act.**

The requested instruction presented a theory of defense grounded in the words of the statute O.C.L.A. 102-1603 provides:

“It shall be the duty of owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be.”

This court has declared of this section:

“As will have been seen, section 6787 of the Oregon Laws expressly declares it to be the duty of ‘own-

ers, contractors, sub-contractors, foremen, architects, or other persons having charge of the work' in question to see that the Employers' Liability Act is complied with. That duty is by the statute distinctly placed upon each of those specifically mentioned, and all other persons having charge of the particular work, in precisely the same way and to precisely the same extent. Neither the owners nor the superintendent are by statute made any more responsible for the construction or operation of the particular structure in question than the foreman. The duty so imposed upon each can no more be delegated by the one than by the other. Such being the statute of the state, the courts are bound by it." *Marks v. Bauers*, 3 F. 2d 516, 518, *cert. den.* 268 U.S. 704, 69 L. Ed., 1167, 45 Sup. Ct. 639.

In that case the foreman of a rock-crushing plant was denied recovery because he was a person in charge and hence responsible for seeing that the requirements of the Act were complied with. The only question presented here is whether or not the decedent truck driver was one of those contractors "or other persons having charge of the particular work" within the meaning of the statute. The refusal of the requested instruction was thus error unless it can be said as matter of law that the decedent Hutchens was not in charge of the unloading operation in this case. In view of the Agreed Facts set out in the Pre-Trial Order it can not be so held.

Paragraph III of the Agreed Facts states in part:

"The usual process in unloading a truck was as follows: One end of a sling line was anchored to the brow log and the other end left free. Log trucks were driven to a place alongside the brow log being used and spotted in position by a signal from the crane engineer. In unloading the trucks the truck driver took the free end of the sling line and placed it under the logs to be unloaded, then attached it to the lifting crane. When the line was so attached, the engineer operating the crane took the slack out of the line. The truck driver then made his load ready for dumping and gave a signal to the crane engineer to hoist the log." (R. 9-10)

Paragraph IV of the Agreed Facts states:

"On August 19, 1949, the deceased, Dean Hutchens, was the driver of a logging truck delivering logs to said dock and was engaged in log unloading operations near said brow log. The truck being unloaded consisted of one large log approximately 40 feet long and 52 inches in diameter. Dean Hutchens spotted the truck under the unloading dump at a point indicated by the crane engineer. He thereupon got out of the truck and pulled the sling line over the reach and under the log and fastened the end of it to the hook on the unloading crane. Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log." (R. 10)

From the Agreed Facts it appears that the log truck driver had the following duties in the unloading operation:

- (1) handling the sling line and attaching it to the lifting crane, and
- (2) making his load ready for dumping, and
- (3) giving the signal to the crane operator to hoist the log.

The driver's control of the unloading operation is shown by the agreed fact that load could not be dumped until the driver gave the signal. The load was his, and it was his responsibility to unload it. He was not a carpenter obliged to obey orders or a buckler whose sole duty it was to saw trees where they had been marked. *Moen v. Aitken*, 127 Or. 246, 271 Pac. 730; *Yovovich v. Falls City Lumber Co.*, 76 Or. 585, 149 Pac. 941.

His situation as a contract log hauler was similar to that of the contract timber faller involved in the case of *Robbins v. Irwin*, 180 Or. 667, 178 P. 2d 935. In that case the court held that the trial court did not err in refusing to instruct the jury "that Joseph L. Peter, acting as a faller, as a matter of law is not one in charge or control of the work under the terms of the Employers' Liability Act" because the evidence tended to show that Peter and Wilcox (team of fallers) were in charge of the particular work in which they were engaged.

The evidence in favor of Peter being in control there should be compared with the evidence in favor of the

decendent being in control here. In the Robbins case the court summarized the evidence as follows:

“There is evidence tending to prove that it was the duty of both Wilcox and Peter to determine what trees to fell and where to fell them; to make the areas or strips in which they were operating safe from various hazards; and to prepare runways or means of escape for themselves from the dangers of falling trees and to clear them of obstructions.” (P. 669)

The court there held that this evidence was sufficient to prevent the court from saying as a matter of law that Peter was not in charge of the work even though his partner, Wilcox, was the head faller of the two-man team. Here the court below took the position that as a matter of law the decendent contract log hauler was not in charge of the unloading operation. Yet the only discretionary act in the otherwise mechanical process of unloading was done by the contract log hauler: he decided when the logs should be dumped. An automaton could have performed the rest of the operation, hence the contract log hauler must have been the contractor or other person “having charge of the particular work.”

The various items of negligence specified by the plaintiff in the pre-trial order center around a lack of proper signals or warning, either by rules of operation,

additional workers, or by mechanical devices. The case of *Straub v. Oregon Electric Ry. Co.*, 163 Or. 93, 94 P. 2d 681, answers these contentions. That case involved the foreman of a railroad, and the Oregon Employers' Liability Act was assumed to apply. The Court said:

"3. The plaintiff was the conductor and foreman of the switching crew, as alleged by him, and it was his duty to see that the work in which he and the crew were engaged was performed in a safe manner. In that capacity he had supervision over the engine crew engaged in switching operations. If the defendants were negligent in moving the cars from the spur track onto the lead track at an unnecessary and unusual speed, if they were further negligent in failing to stop the engine before the car on which the plaintiff was riding was moved over the switch, or if they were still further negligent in that the engine crew failed to keep a proper lookout as to conditions prevailing at the switch and failed to stop the engine, then such acts of negligence must of necessity be charged to the plaintiff as the vice-principal of the defendants.

As already stated, the plaintiff alleged that it was his duty to see that the work in which he was engaged was performed in a safe manner. Therefore, it was incumbent upon him to make sure that there was sufficient clearance before causing the cars to be moved from the spur track onto the lead track. Under such circumstances, *he cannot complain of the failure of the defendants to warn him of the defective clearance, or their failure to provide a signal man at the switch.*" (P. 101) (Emphasis supplied)

The case at bar is stronger than either the Straub or the Robbins cases because of the contractual situation here existing. The decedent log hauler had no contract with the appellant but did have a log hauling contract with W. R. Francis, a logging contractor. Francis, in turn, had contracted with the defendant to do certain logging and deliver the logs to the defendant at Toledo. This contract was admitted in evidence and now is available to this court. (Defendant's Exhibit 1; R. 280, 82, 330) By its terms Francis was to be paid for logs delivered upon the basis of "net water scale" meaning "what logs are bought and sold on in the water." (R. 281) The logs were to be delivered in the sticks (raft boom sticks) by Francis. (R. 281) They were then scaled by the appellant. (R. 244-5)

The defendant contends that Francis was obliged by the contract to deliver the logs in the water, i. e. after unloading. (R. 248, 286) Supporting this interpretation of the contract is the fact that the defendant charged Francis for the proportionate share of the labor cost of the operation of the dump. This proportionate share was determined by the log footage Francis dumped there as compared with the total footage dumped by all such logging operators. The dump was operated as "a non-profit set-up" for the logging operators like Francis. (R. 283-285)

The fact that Francis was obliged to deliver the logs

in the water strongly supports defendant's contention that the decedent truck driver was in charge of the unloading operation. He had contracted with Francis to deliver logs for Francis, and his job was not finished until the logs were in the water. In view of the contractual relationship it was natural that the driver should be in charge of the unloading operation, and the agreed fact that he was to give the unloading signal confirms it.

### **SPECIFICATION OF ERROR VIII**

The District Court erred in refusing to give defendant's requested instruction No. XVIII which totidem verbis was:

"I instruct you that if you find that the crane engineer's wages were paid to the Logger or some deducted from the remittances made to the Logger on account of the crane engineer's wages while assisting in the unloading of the log in question, you could consider this along with other evidence as to whether the truck driver or Logger was in charge of the unloading operation." (R. 45)

The grounds of objection urged at the trial to the District Court's refusal to give said instruction were:

"THE COURT: You raised that in the question on the motion for a directed verdict.

MR. POWERS: Yes. The instructions go to the



same. And also the following requested instruction, which is defendant's request No. 18—that would go to the same point we asked for in respect to the Court's failure to give that." (R. 317)

\* \* \*

"THE COURT: You may have your exceptions."  
(R. 320)

The grounds for a directed verdict were the same as those stated in defendant's motion for an involuntary non-suit with exceptions not here pertinent. (R. 291) The following grounds stated in support of an involuntary non-suit were incorporated by reference in the grounds of objection urged at the trial to said instruction:

"There is no evidence on which the jury could return a verdict of a violation, so we submit to your Honor that we are entitled to a nonsuit at this time, and in that connection I will call your Honor's attention to the recent authorities which have held that a man, where he is responsible for making his own working conditions, is not entitled to the protection of the Act if he fails to take a safe position if there is one open to him. We further call your Honor's attention to the undisputed evidence in this case that the deceased was the one in charge of the truck and the fastening of the chains and unfastening of the chains and making it ready for the unloading, and through no stretch of the imagination could it be argued or could a jury of reasonable-minded persons find from anything in this case that there was any defect in any of the equipment or

machinery of the C. D. Johnson Lumber Corporation.  
(R. 227-228)

\* \* \*

"And we move for a nonsuit on the further ground that it appears affirmatively from the evidence that the deceased was the one that was actively in charge of the equipment of the truck and the chain and the bunk blocks, and the only thing that might possibly be said to have been negligently attached or defective in some way. There might be some inference there was something wrong with that equipment, and, on the other hand, there is no evidence that there was anything wrong with ours, with this defendant's here; and on the further ground that it was the deceased, himself, who made his own working conditions, and that there was a safe place to go, and that it appears that he got into a place where he is forbidden to go by law." (R. 234)

Said specification of error covers questions raised by Appeal Point 4(a).

**Point: Evidence as to who paid the crane engineer is relevant in determining who was in charge of the unloading operation.**

It has already been pointed out that defendant withheld from payments to W. R. Francis under his logging contract certain amounts for dumping the logs. (R. 155-6, 283-4) It was undisputed that the services of the crane engineer were paid for by such withholdings. (R. 279-280, 155-6)

This evidence is clearly logically relevant to show that either the logger or his contractor, the decedent log hauler, was in charge of the unloading operation. In Oregon closely analogous authority holds that such evidence may be considered. *Dibert v. Giebisch*, 74 Or. 64, 144 Pac. 1184, held that payments made by the defendants of the wages of men employed in clearing land was admissible as a circumstance from which the jury might reasonably have inferred that the defendants were having the work done on their own account and not by an independent contractor who was engaged to do the clearing. In that case a man hired by the independent contractor was injured cutting a stump, and the court held that the evidence sustained a finding that the man injured was in the employment of the defendants, the persons who paid him.

Keeping in mind the contractual obligation of the "logger" to deliver the logs in the water, appellant believes under the Oregon authorities that the court committed reversible error. In *McCauley v. Steamship "Willamette"*, 109 Or. 131, 215 Pac. 892, implicitly applied the above rule to aid in determining who is a person "having charge" within the meaning of the Oregon Employers' Liability Act. In that case a longshoreman was injured while loading lumber on a ship from a lumber company dock and he sued both the ship and the lumber company. The court said:

“5. But the ‘and generally’ clause did not govern the lumber company. The piling of the lumber had been completed about three weeks before the steamship came for the lumber. The work of the lumber company was ended when the piling of the lumber was completed. Nothing more remained to be done with or about the lumber except to load it upon the vessel; and the work of loading the lumber was entirely under the control of the captain of the ship. McCauley and all the other longshoremen ‘employees of the ship,’ took their orders ‘direct from the captain of the ship,’ *and were paid by the captain of the ship*. The language of the ‘and generally’ clause is: ‘Having charge of, or responsible for, any work involving a risk or danger to the employees’.” (P. 145) (Emphasis supplied)

It is significant that the court considered who paid the longshoremen in determining who was a “person having charge” within the meaning of Employers’ Liability Act. Both reason and authority support the proposition that to determine under the statute who is the party “having charge of the particular work” the jury should be permitted to consider who is ultimate payor of the wages of the persons engaged in the particular work.

In *Swayne & Hoyt, Inc. v. Barsch*, 226 Fed. 581, this court considered evidence as to who paid the injured longshoreman in determining who was the responsible party in a case in which the Oregon statute was involved. The precise question presented was whether

the ship owner or the defendant who claimed to be managing agent only, was responsible as employer of the plaintiff. This court in reviewing the evidence said:

“The defendant was a corporation of the state of California, doing business there, and at Portland through its local agent Kennedy. Kennedy testified that it was his duty to act for the defendant in the capacity of agent in directing the movement of ships that were being run into the port of Portland, *to pay all bills for the ships, including the bills of the men who helped to load and unload the same; that the plaintiff was on the defendant’s pay roll, and was working for the defendant; that he (Kennedy) accounted to the defendant for the money paid out to the men; that it was the defendant’s money that he was paying out to the men for unloading the ship; that he did not report the accident to plaintiff to the owner, but to the defendant; that the defendant was the managing agent of the Camino, with power to direct the movements and operations of the officers and crew, and that it employed the officers of the ship.*” (Emphasis supplied) (P. 584)

The court held that this and other evidence was sufficient to show that “the defendant had full charge of the operation of discharging the ship.” This case has other factual similarities to the case at bar because there a stevedore was injured on the dock when the dock foreman gave a signal to the winch operator on ship too soon and a steel beam was raised abruptly injuring the plaintiff. The defendant who had charge of

the unloading was held liable rather than the ship owner who merely provided the lifting gear as did the appellant in the case at bar.

### **SPECIFICATION OF ERROR IX**

The District Court erred in refusing to give Defendant's Requested Instruction No. XXIII which totidem verbis was:

"I instruct you that the Logging Safety Code of the State of Oregon provides that all bunker chains and binder chains shall so be attached that they can be released from the side opposite to the brow log and if under the evidence you find in this case that the chains used could not be detached from the side opposite to the brow log, then in that event this provision of the logging code would have been violated and in this connection you are instructed that it was the duty of the Logger Francis to see that this provision was complied with in the event the deceased was an employee of Francis; and you are further instructed that it would be the duty of the deceased to see that this provision of the safety code was complied with in the event you would find that the deceased was an independent contractor and not an employee. In short, it would be the obligation of either Francis, the Logger, or the deceased, if he were an independent contractor, to comply with this safety rule and a failure to comply with the same would be negligence as a matter of law. And if you should further find that the failure to comply with this safety rule was the sole proximate cause of the accident, then in that event there could be no recovery here and your verdict would be for the defendant." (R. 47)

The grounds of objection urged at the trial to the District Court's refusal to give said instructions were:

“MR. POWERS: Well, then, we would like an exception if the Court please, to the Court's failure to give requested instruction No. 23, which is that the logging code provides with respect to bunker chains and that they be attached so that they can be released from the opposite side from the brow log, and also the binder chains, \* \* \*.” (R. 318)

\* \* \*

“THE COURT: You may have your exceptions.” (R. 320)

Said specification of error covers questions raised by Appeal Point 4(b).

**Point: Either decedent or “logger” had the duty of complying with the Logging Safety Code in regard to log load chains and failure to comply was negligence as a matter of law.**

Chapter No. 17 of the Logging Safety Code covers log dumps, booms, and ponds. Section 17.13 thereof provides:

“Binder and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading.” (P. 76)

It has already been argued that violation of the Logging Safety Code amounts to negligence as a manner of law and that argument is hereby incorporated herein. (See Specification of Error No. IV.)

In addition at the trial there was testimony by an expert called by the plaintiff that it would be unsafe practice if someone had to go between the loaded truck and the brow log in order to unfasten his chains. (R. 205) Under the facts of this case the decedent could have had no business being between the brow log and the load except to loosen his load. If he had to go there to loosen his load, he was in violation of section 17.13 of the Code.

The particular question raised by this instruction is: whose duty was it to comply with the Code? Appellant contends that either the logger, W. R. Francis, or the decedent log hauler were responsible for complying with section 17.13 and not the defendant. As has been previously pointed out Francis was obliged to deliver the logs in the water and the decedent had contracted to assist him in that endeavor. (See Specification of Error VII) To carry out his contract Francis paid for the wages of the crane engineer (R. 279-280, 155-6, 283-4), and was paid \$15.00 per thousand board feet net water scale to log the timber, haul it, and dump it in the water at Toledo. (Defendant's Exhibit 1; R. 280-281) Francis testified:



“Q.: You had a contract with Johnson to haul logs, did you not? A.: Yes.

“Q. And you undertook in your contract, did you not, to comply with all the state rules and regulations with respect to the delivery of those logs? A.: Yes.” (R. 161)

It was Francis’s own understanding that he was to comply with state regulations like the provisions of the Logging Safety Code; and irrespective of that, he had a contractual obligation to obey all laws and rules relating to logging. (R. 280)

Whether or not Francis was not responsible for complying with the binder and bunk block chain regulation, the decedent log hauler was. He was the registered owner of the truck he was operating. (R. 10) The bunk blocks and binder chains are part of the truck equipment. (R. 132) Upon the loading of his truck the decedent put the binder chain in place. (R. 167, 170) The driver is responsible for his own equipment. (R. 259, 274) It was an agreed fact that it was the job of the driver to make his load ready for dumping. (R. 10)

The plaintiff states in her contentions that the usual procedure was for the driver to unfasten his binder chains and bunk blocks. (R. 15) It is undisputable that physically the decedent log hauler was in charge of the chains on his truck and their proper use and functioning.

The contractual arrangements of Francis and the decedent log hauler confirm that. According to plaintiff's contentions set out in the pre-trial order:

“In July, 1949, decedent made oral arrangements with W. R. Francis to haul logs from Francis' operation to the C. D. Johnson Lumber Corporation dock at Toledo at an agreed rate per thousand board feet for the haul as compensation for the truck and for Hutchens' services as a driver. It was agreed that Hutchens would haul exclusively for Francis when he and his truck were needed. Hutchens did not agree to haul and Francis did not agree to furnish Hutchens with any certain quantity of logs or for any certain period. Either party was free to terminate the relationship at will.” (R. 13)

The point at which the decedent's responsibility for delivering his logs terminated was determined by Francis' contract with the defendant and was only terminated when the logs were in the water at Toledo. Under the terms of the statute under which the Logging Safety Code was promulgated, it was incumbent on both Francis and the decedent to comply with the Code. O.C.L.A. 102-1236 so provides:

“Every employer, employe and other person shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in connection with the matters herein specified, or in any way relating to or affecting safety of employments or places of employment, or to protect the life

and safety of employes in such employments or places of employment, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation.”

An interchange between counsel at the pre-trial conference is illuminating:

“MR. POWERS: \* \* \*.

Now, another point. Is it not your contention that he had to be between two trucks and the brow log in order to unload his truck, and that that is what he was doing at the time of the accident?

MR. BABCOCK: That’s correct.

MR. POWERS: Is it not part of the Safety Code rule that your binder chain shall be so put on that it is to be unfastened and released from the opposite side of the brow logs?

MR. BABCOCK: Well, whether it is and whether that applies to the decedent in this particular situation is a question. I don’t know. \* \* \*” (R. 103)

An inspection of plaintiff’s Exhibit 18, the Logging Safety Code, will show that there is no doubt that section 17.13 applies here. That section is found in the section relating to log dumps and ponds, but it is significant that similar passages occur elsewhere in the Code in other connections showing that section 17.13 is precisely in point here. See section 8.33 in Chapter 8 on loading

logs, and section 11.26 in Chapter 11 on motor truck transportation where the prohibition is set forth in bold-face type. The plain meaning of the Code is that section 17.13 is applicable here and the court should have instructed the jury to find whether it was violated because its violation would be negligence as a matter of law, and either Francis or the decedent would be chargeable with and responsible for that negligence. If that negligence was the sole proximate cause of the accident, then there could be no recovery here. *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223; *Vanderflute v. P. R. L. & P. Co.*, 103 Or. 398, 205 Pac. 551.

### SPECIFICATION OF ERROR X

The District Court erred in refusing to give defendant's requested instruction No. XXXIV which totidem verbis was:

“I instruct you that if you find from the evidence that the deceased Dean Hutchens carried on his work in and around the truck in connection with the unloading of the log by himself and without the intermingling in that work of any employees of C. D. Johnson Lumber Corporation, then in that event the E.L.A. would have no application and your verdict would be for the defendant.” (R. 52)

The grounds of objection urged at the trial to the District Court's refusal to give the said instructions was:

“MR. POWERS: \* \* \* That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

THE COURT: I know the instruction.

MR. POWERS: Yes. And you left out the intermingling of employees and probably rules as a matter of law, but we think the instruction in that respect was incorrect and should have been given.”  
(R. 318)

\* \* \*

“THE COURT: You may have your exceptions.”  
(R. 320)

Said specification of error covers questions raised by Appeal Point 8.

**Point: Under the Oregon Employers' Liability Act an employer is not liable to the employee of another employer unless there is an intermingling of both sets of employees.**

The question of intermingling between the decedent and defendant's employers under the Oregon Employers' Liability Act was a question of fact. *Walters et. al. v. Dock Commission*, 126 Or. 487, 266 Pac. 634, 270 Pac. 778. The court's refusal to submit the question of intermingling to the jury amounted to a ruling as a matter of law that there was no intermingling here.

Lack of intermingling is a valid defense under the Act, because it is well settled that a contractor is not liable for injuries sustained by a servant of the sub-contractor unless there is intermingling. *Tamm v. Sauset*, 67 Or. 292, 135 Pac. 868. The case at bar is then an a fortiori case of non-liability on the part of the defendant since it has not been established here that the decedent was a servant of the sub-contractor, Francis.

The intermingling exception to the general rule that an employer is not liable to the employees of another employer has been formulated as follows: there is liability on the part of the "non-employing" employer if there is "an intermingling both of duties and employees in the work then being prosecuted." *Drefts v. Holman Transfer Co.*, 130 Or. 452, 458, 280 Pac. 505.

In that phrase the court was referring to the situation existing in *Rorvik v. North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163. In that case a ship captain standing on a wharf directing the loading of his ship was knocked into the water by the negligent action of the employers of the lumber company in handling lumber. The court held that the captain's widow might hold the lumber company liable under the Act.

The crucial fact in determining that the two sets of employees intermingled is the contract governing the relation of the employers. The contract of sale there

provided that the lumber should be placed on the wharf within reach of the ship's tackle by the lumber company, and the company was in the process of doing that when the accident happened. In the case at bar the contract governing the operation was different; here the logs had to be delivered in the water. (See the logging contract, Defendant's Exhibit 1). It can not be said that here the employers of the appellant intermingled with the decedent on the contractual dividing line between Francis and the appellant.

It was Francis's obligation to deliver the logs in the water and operations on the dock were still clearly within his contractual obligation and not on the terminal edge of that contractual obligation. This construction of the contract is supported by the fact that Francis had to pay the wages of the crane engineer in dumping the logs, and he was the only employee of the appellant necessary to the unloading operation. (R. 279-280, 155-6)

This case falls between the Rorvik case and *McCauley v. Steamship "Willamette,"* 109 Or. 131, 215 Pac. 892. There again the factual situation was injury to a man on a lumber dock while a ship was loading lumber. In that case the lumber company had piled the lumber ready for loading some three weeks before the accident and nothing remained to be done except to load it and that was a responsibility of the ship. The court held that

a longshoreman injured on the dock in loading could not recover from the lumber company since as a matter of law the company was not liable under the Act, although plaintiff had alleged and there was considerable evidence that defective piling of the lumber was the cause of the accident. (Pp. 137-141)

The final case in point is *Pacific States Lumber Co. v. Barger*, 10 F. 2d 335, decided by this court. Again the plaintiff is a longshoreman injured on a lumber company dock while loading a ship with lumber. Again the lumber company had the obligation to deliver the lumber within reach of the ship's gear. An employee of the defendant lumber company sent a load toward the plaintiff at 3 miles per hour, and the plaintiff was injured trying to stop it. The lumber company was held liable. It is clear that the accident occurred at the exact contractual dividing line between the stevedoring company and the lumber company.

In the case at bar the appellant lumber company had not yet assumed control of the logs under its contract with Francis and would not do so until they were in the water where the appellant's boom man would take over. Here there was no intermingling because the contractual obligation of Francis was not finished—the decedent was still working within the terminal edge of that obligation.



**CONCLUSION**

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and that this case should be reversed, with direction for judgment for appellant or for a new trial.

Respectfully submitted,

JAMES ARTHUR POWERS,

NORMAN N. GRIFFITH,

## Appendix I

### APPENDIX

The following portions of the Oregon Employers' Liability Act, O.C.L.A. § 102-1601-6, may be pertinent to the decision of this case and are not set out in the text:

**§ 102-1601. Devices, care and precautions required of owners, contractors, etc., for protection and safety of employees in dangerous employments.**

“All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested, so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, when-

## Appendix II

ever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices. (L. 1911, ch. 3 § 1, p. 16; O. L. § 6785; O. C. 1930, § 49-1701)''

### **§ 102-1602. Who considered agent of owner.**

“The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for

## Appendix III

damages for death or injury suffered by an employee. (L. 1911, ch. 3, § 2, p. 16; O. L. § 6786; O. C. 1930, § 49-1702)”

**§ 102-1603. Duty to comply with act; penalty for non-compliance.** Omitted. (Set out in the brief at page 53).

**§ 102-1604. Who may prosecute damage action for death: amount of damages unlimited.**

“If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor or any person liable under the provisions of this act, the surviving widow or husband and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the state of Oregon, then the executor or administrator of such deceased person shall have the right to maintain such action for their respective benefits and in the order above named. (L. 1911, ch. 3, § 4; L. 1919, ch. 270; O. L. § 6788; L. 1921, ch. 26, § 1, p. 38; O. C. 1930, § 49-1704.)”

**§ 102-1605. Fellow-servant's negligence as defense.**

“In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow-servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the

## Appendix IV

structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person had has authority to direct the doing of said act.” (L. 1911, ch. 3, § 5, p. 16; O.L. § 6789; O.C. 1930, § 49-1705.)

### **§ 102-1606. Contributory negligence.**

“The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage. (L. 1911, ch. 3, § 6, p. 16; O. L. § 6790; O. C. 1930, § 49-1706.)”

## **APPENDIX II**

38 U.S.C.A. sec. 516 provides insofar as pertinent:

“Where any person has heretofore allowed his insurance to lapse, or has cancelled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was

## Appendix V

not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act as amended by Act December 24, 1919, c. 16, 41 Stat. 371 would purchase if applied as premiums when due, shall not be considered as lapsed, cancelled, or reduced; \* \* \*."

## APPENDIX III

Rule 515 of the American Law Institute Model Code of Evidence provides:

"Subject to Rule 519, evidence of a writing made as a record, report or memorandum of facts and conclusions concerning an act, event or condition, unless specifically privileged from disclosure by a statute requiring it to be made, is admissible as tending to prove the truth of the matter stated therein if the judge finds that

- (a) the writing was made in the performance of the functions of his office by an official of a state or nation or governmental division

## Appendix VI

thereof, acting personally or through his subordinates, and

- (b) it was a function of the official acting personally or through his subordinates
  - (i) to do the act, or
  - (ii) to observe the act, event or condition, or
  - (iii) to investigate the facts concerning the act, event or condition and to make findings or draw conclusions about it.”





**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellant,*  
vs.

KATHLEEN HUTCHENS, *Appellee.*

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KATHLEEN HUTCHENS, *Appellant,*  
vs.

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee.*

---

**ANSWER BRIEF OF APPELLEE**

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Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

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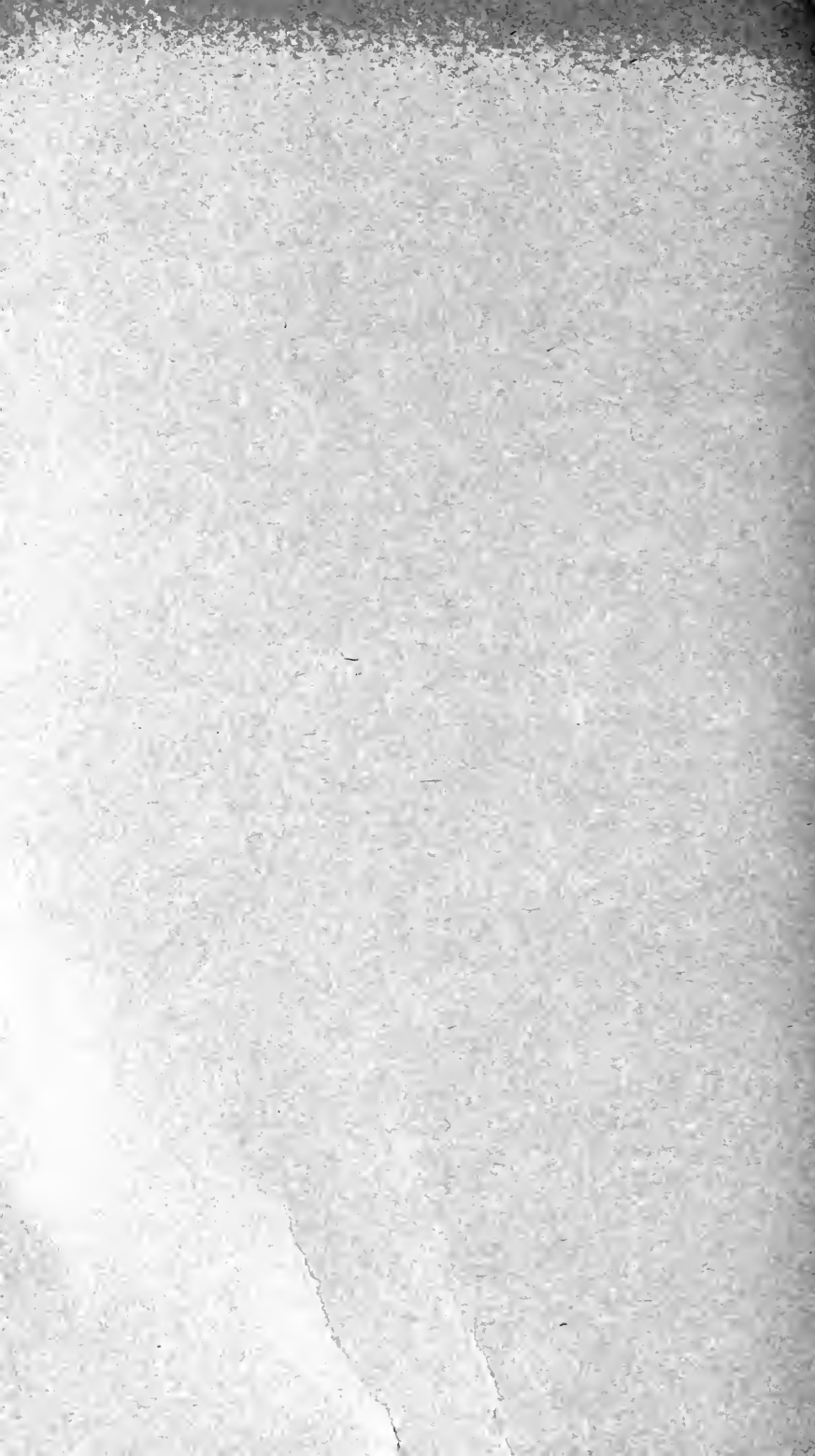
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Persons on the premises of an owner having charge of, or responsible for, work involving a risk or danger to its employees or the public, with the authority of said owner and engaged in work there in furtherance of a common enterprise or by virtue of a contractual relationship which requires that the orbit or scope of their employment to be about the machinery or work of said owner in the accomplishment of said common purpose in which the owner has an interest, are subject to the protection of the Employers' Liability Act.

Employers' Liability Act provides protection to all employees and certain members of the public engaged in work involving a risk or danger.

Protection of the Act is not confined to only "employees" of the person having charge of or responsible for work involving a risk or danger.

Protection of the Act also extends to other persons not employees of the person in charge of work that are on the premises in the furtherance of a common enterprise or by virtue of some contractual relationship.

Independent contractor decisions involving the Employers' Liability Act support the proposition that it is the person having charge of and responsible for work involving a risk or danger that is responsible under the Act.

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Appeal from the District Court of the United States for  
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---

A Statement of Facts has been heretofore filed in  
Cross-Appellee's Brief and will not be repeated here.

## **ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR NOS. I TO X**

This Court has held in *Williams v. Dodd*, 163 Fed. (2d) 724, that points argued by appellant but not stated in the Statement of Points need not be considered by the Appellate Court. A comparison of "Appellant's Statement of Points upon which Appellant will Rely on Appeal" (T. 83), with Appellant's Brief, Subject Index, Specifications of Error Nos. I to X, shows that there is almost no similarity between the two. Where an extremely liberal view might suggest that in some items the substance is the same, a closer reading shows a material variance. Appellant's Brief appears to contain matters not found in the Statement of Points.

Appellee finds that, because of inconsistencies, omissions and contradictions appearing in Appellant's Brief, a point by point answer would not aid in resolving the matters in issue.

To illustrate, in Appellant's Brief, Specifications of Error No. I, appellant complains that the Court did not require the employment status of the decedent to be found as a prerequisite to applying the Employers' Liability Act. Yet, in its No. I of "Points upon which Appellant will Rely on Appeal", it complains that its motion for a directed verdict should have been granted because decedent left the safe place provided for doing his work and, contrary to law, entered a place of danger.

In its Brief, Specification No. II, appellant complains of refusing to give a charge that the action could not be



maintained if decedent was found to be an independent contractor. Point No. II of its "Points upon which Appellant will Rely" claims error for failing to require the jury to determine the status of deceased's employment.

In Specification No. III, Appellant's Brief, the appellant complains because the Court refused to admit a ruling of the Industrial Accident Commission as to the employment status. Examination of the documents quoted by appellant in its brief on page 19 shows a rejection of the claim because deceased was not employed subject to the provisions of the Act. This might have been because his employer had rejected the Act or that the employee was a relative of the employer, or because he was a farm worker or any one of a myriad of reasons, but not by any stretch of the imagination could it be used to establish the fact that deceased was the person that had the direction and control over the unloading work and was therefore not protected by the Employer's Liability Act. In addition, under the provisions of Section 102-1729, O.C.L.A., the document was clearly inadmissible. At best the document was hearsay. The State Industrial Accident Commission is not a body that is authorized to determine the facts in a case, as is the Washington Commission. In Washington, the Commission is a fact-finding body, and its decisions may be upset only on a failure of evidence to support the findings. In Oregon, the Commission is purely an administrative body that makes its investigation in the absence of the claimant, and the claimant's first opportunity to have his day in Court and the right to examine and cross-examine witnesses and rebut evidence appear when the case is tried de novo in the

Circuit Court. Therefore, the general rule that administrative decisions are admissible in evidence is not applicable to reports or orders of the Oregon State Industrial Accident Commission, as they are res judicata as to nothing as concerns the rights of the claimant. See *Tice v. State Industrial Accident Commission*, 183 Or. 593.

In Specification of Error No. IV, appellant complains because the Court did not instruct that violation of the Logging Safety Code was negligence per se. Yet, in Specification No. V, it complains because the Court did not withdraw all of the specifications of negligence from the complaint because they were specifications of violation of the Logging Safety Code.

Under its Specification No. VI of its Brief, appellant proposes the novel doctrine that where decedent leaves a safe place and enters an unsafe place, in violation of the Logging Safety Code, it exonerates the employer. It has long been settled that, under the Employers' Liability Act, the person having charge of or responsible for any work involving risk or danger to its employees or the public is charged with a higher degree than ordinary care. *Stanfield v. Fletcher*, 114 Or. 531. The duties imposed are non-delegable, absolute and continuing and the doctrine of assumption of risk by an employee does not apply to actions for injuries under the Act. *Dorn v. Clarke-Woodard Drug Co.*, 65 Or. 516. Further, it is the duty of the person having charge of and control of the work to see that there is no unsafe place to work. *Suey v. Benson Hotel*, 91 Or. 395. Also, *Shields v. W. R. Grace and Co.*, 91 Or. 187. It is further interesting to note that appellant predicates its argument on the fact

that decedent was an employee, apparently for the moment abandoning its contentions that he was an independent contractor.

In Specification of Error No. X of the Brief, appellant complains that the Court failed to instruct that, if there was no intermingling with employees of defendant, the Act would have no application. The only evidence relative to this matter showed that the truck driver, the unloading engineer, the boom boss and the pond man worked as a team together to accomplish the unloading work, the work being directed by the boom boss and the unloading engineer. The work of each was so closely integrated and interdependent that there could be no occasion for giving the requested instruction. Taken as a whole, appellant's brief poses only one question which, if answered, resolves all other points.

## ARGUMENT

*Members of the public are protected by the Employer's Liability Act when on the premises of an owner or person having charge of, or responsible for, work involving a risk or danger:*

- (1) *When the member of the public is there with the authority of the owner; and*
- (2) *When the member of the public is engaged in work there in furtherance of a common enterprise with said owner; or*
- (3) *When the member of the public is there by virtue of a contractual relationship which requires that the orbit or scope of his employment be*

*about the machinery or work of said owner in the accomplishment of a common purpose in which the owner has an interest.*

The evidence and the pleadings show that, at the time of the fatal accident, the appellee's decedent, Dean Hutchens, was employed by W. R. Francis, a small logging contractor, to haul logs for Francis with his log truck. That Francis was performing a contract with appellant C. D. Johnson Lumber Corporation to fall, yard and haul appellant Johnson Corporation's timber, of which decedent's work was a part. That in delivering said logs of appellant Johnson Corporation, the deceased was required to deliver them to the unloading dump of the appellant Johnson Corporation. That the unloading dump was owned and operated under the direction and control of appellant Johnson Corporation, its unloading engineer and log dump boss. The unloading operations required that the truck driver had to work with team-play cooperation with the unloading crew to dump the load under the direction and control of the unloading crew and intermingling with them. That at the time of the fatal accident, Dean Hutchens had arrived at the log dump and was taking off his binder chains under the direction of the appellant to prepare his load for dumping, when the appellant's crane engineer dumped the log, crushing him to death.

The Court, during the course of the trial, held "the only question is whether or not they were engaged in a common enterprise and whether or not plaintiff's decedent was on the premises lawfully and as long as that is shown I think the Act will apply."

In support of appellee's position, the following points and authorities are submitted:

(1) The Employers' Liability Act of the State of Oregon provides protection to all employees and certain members of the public engaged in work involving a risk or danger.

The "and generally" clause of the Act with which we are here concerned reads as follows:

" \* \* \* and generally, all owners, contractors or sub-contractors *and other persons having charge of*, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and protection which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices." (Emphasis added)

The requirements of the law are extended by the latter part of this section to all persons having charge of or responsible for any work involving risk or danger to employees or persons having a lawful or contractual right to be on the property. *Dunn v. Orchard Land Co.*, 68 Or. 97; *Marks v. Bauers*, 3 Fed. (2d) 516; *Fitzgerald v. Oregon-Washington R.R. & Nav. Co.*, 141 Or. 1.

(2) It is well established by a line of decisions of the Oregon State Supreme Court that the protection of the Act is not confined to only "employees" of the person having charge or responsible for the work. It places a duty on employers to other persons, not their employees, so that where the duties of such other persons bring them

within reach of dangers, they must be protected by the person having charge of the danger.

- Clayton v. Enterprise Electric Co.*, 82 Or. 149;  
*Cauldwell v. Bingham and Shelley Company*, 84 Or. 257 (1917);  
*Rorvik v. North Pacific Lumber Co.*, 99 Or. 58 (1921);  
*Walters v. Dock Commission*, 126 Or. 487 (1928);  
*Coomer v. Supple Investment Co.*, 128 Or. 224;  
*McKay v. Pacific Building Materials Co.*, 156 Or. 578;  
*Pacific States Lumber Co. v. Barger*, 10 Fed. (2d) 235.

(3) Protection of the Act also extends to other persons or members of the public not strictly speaking the employees of the owner or person in charge of the work or of another employer, provided that the person seeking the protection of the Act is on the premises with the authority of the owner and is engaged in work there in furtherance of a common enterprise or by virtue of some contractual relationship which exposes him to risk or danger.

In *Clayton v. Enterprise Electric Co.*, 82 Or. 149, the defendant was engaged in furnishing electricity to a pumping plant, and an employee of the owner of the pumping plant was killed as a result of defendant's failure to properly guard and cover the electric wiring and connections. The employee was engaged in work for his employer at the plant at the time he was electrocuted. The Court, in holding that the Employers' Liability Act applied to the case, stated in part as follows:

“ \* \* \* The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they were employees of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life: *Blair v. Western Cedar Co.*, 75 Or. 281 (146 Pac. 480).”

In the case of *Turnidge v. Thompson*, 89 Or. 637 (1918), an action for wrongful death was brought by a widow under the Employers' Liability Act against defendant, who owned an electric plant and transmission line. A line to a farm line from the main line on the county road crossed certain private premises. The decedent lived nearby and was killed walking across these private premises when he came in contact with the line, which had been permitted to sag almost to the ground. It was held by the Court that the Employers' Liability Act did not apply in this particular case. In its opinion the Court stated in part as follows:

“ \* \* \* Nowhere does the statute state in direct or express terms that a member of the public, who is not also an employee or a person engaged in work on or about a machine, structure or the place specified by the act, shall have a right of action for damages. The Employers' Liability Act does not expressly confer upon the public or upon any person as a mere member of the public the right to sue for damages whenever injured. If a person who is simply a member of the public can claim the protection of the Employers' Liability Act and sue an owner of a transmission line carrying electricity, he has such a right only because of the inferences and implications to be drawn and derived from the use

of the word 'public' in the three particulars already mentioned. The avowed purpose of the statute was to protect working men and working women; and since the statute is remedial it should be liberally construed so as to accomplish its express purpose." Pp. 642-649.

"The title informs us that the bill provides for the protection and safety of persons 'engaged in' certain work and that the purpose is to extend the liability of employers to their employees; but the title does not contain the remotest intimation that the body of the bill makes the owner liable in damages to a member of the public who is neither 'engaged in' any kind of work mentioned in the title nor an employee of certain persons. \* \* \* When measured by its title, the Employers' Liability Act is broad enough, so far as it concerns an electric wire, to include both employees of the owner of the wire and also persons 'engaged in' certain work, as exemplified in *Clayton v. Enterprise Electric Co.*, supra, but it does not go further and give a right of action to every member of the public \* \* \* ." P. 653.

In *Rorvik v. North Pacific Lumber Co.*, 99 Or. 58 (1920), the plaintiff was the widow of the captain of a steamship, and brought an action under the Employers' Liability Act against the defendant company which operated a dock. The decedent was in charge of the ship which was being loaded at the defendant's dock when he was thrown off the dock and killed, allegedly as the result of the defendant's negligence. It was contended, among other things, by the defendant, that the Employers' Liability Act did not apply in this case, but it was held by the Oregon Supreme Court that it did. In so holding, the Court reviewed the case of *Turnidge v. Thompson* and approved the opinion in that case, stating:



“From the lucid interpretation in that case and in other cases hereinafter mentioned, we deduce the rule that the Employers’ Liability Act does not extend to the protection of the general public as such, but that it does extend its protection to employees of the particular person owning or operating dangerous machinery or engaged in hazardous employment, *and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery*, or expose themselves to the hazards of the machinery or appliances in use by the owner thereof.” P. 70. (Emphasis supplied)

The Court’s attention is also called to the fact that the deceased captain, had he been proceeding against his own employer, and had he been the supervisory employee in charge of the work, would not have been eligible to protection under the Employers’ Liability Act under *Marks v. Bauers*, 3 Fed. (2d) 516, and *Schmidt v. Multnomah Operating Co.*, 155 Or. 53, but here he was not in charge of the work nor was the work that caused his fatal injury being carried on under his direction and control.

In *Coomer v. Supple Investment Co.*, 128 Or. 224 (1929), plaintiff brought an action under the Employers’ Liability Act for injuries sustained while moving cement on a runway and using a hoist of defendant at defendant’s dock and warehouse. Plaintiff worked for a building materials company which was a customer of the defendant. The Supreme Court, in upholding a judgment for plaintiff, stated in part as follows:

“The law requires an employer to exercise every reasonable care and precaution requisite to protect its employees *and others having a duty or a legal*

*right to be on the premises of the employer from injury."* P. 227. (Emphasis supplied)

*Drefs v. Holman Transfer Co.*, 130 Or. 452 (1929), involved the death of the plaintiff's son while he was making an excavation in the streets of Portland while employed by the Pacific Telephone and Telegraph Company. He was killed allegedly as the result of the negligence of drivers of the defendant transfer company and the defendant ambulance company. The action was brought under the Employers' Liability Act and it was claimed that the decedent was engaged in hazardous work at the time of his death. No negligence was charged against the employer. It was held that the action was not within the Employers' Liability Act, for the reason that the Act did not extend to a case where the person charged with doing the injury had no relation by contract or otherwise with the injured workman different from that which he had with the public as a whole. In reaching this conclusion, the Court stated:

*"In order that an employee may recover under the Employers' Liability Act, the orbit or scope of his employment must require him to be about the machinery or work of the owner in the accomplishment of a common purpose in which the owner has an interest."* P. 454-455. (Emphasis as set forth in the opinion of the Court)

The Court later in its opinion quoted the language from the decision in *Rorvik v. North Pacific Lumber Co.*, which is quoted above herein, and then stated:

*"This decision we have followed ever since and we do not think that it extends to any case where the person charged with doing an injury sustains*

*no such relation by contract or otherwise different from that which he sustains to the whole public."* (Emphasis supplied)

"If the Employers' Liability Act applies to this case it applies to every case where an employee of a corporation, while in the prosecution of his business, is run into and injured by a truck owned by another corporation. Such is not the intent of the law, and such an application of it would speedily lead to its repeal. *The Employers' Liability Act is especially designed to protect workers in hazardous employment from the negligence of their employers, or those having some relation to the work or place of work or means required to prosecute the work in which they are engaged*, and not as a substitute generally for injuries for which other statutes or the common law afford redress." (Emphasis supplied) P. 459-460.

In all of these cases above quoted, the Court makes it clear that in a proper case the protection of the Employers' Liability Act can be invoked by a person who is engaged in work on the premises of a defendant owner in furtherance of a common enterprise or because of some contractual relationship between him and the owner, even though he may not be actually an employee of the owner or of anyone else.

In *Rorvik v. North Pacific Lumber Co.*, the decedent was in fact a supervisor or a person who, within the meaning of Section 102-1602 of the Act, was an agent of the steamship company, and was at the time of his fatal injury partially in charge of the work being carried on. He was not an ordinary workman within the usual meaning of the Employers' Liability Act.

In *Saylor v. Enterprise Electric Company*, 106 Or. 421, it is stated by the Court that only a person who is an employee of someone is entitled to the full protection of the Employers' Liability Act. However, that language was not necessary to the decision in that case. The decedent in that case was electrocuted when he was engaged in moving a hay derrick through a gateway on a county road, and the derrick came in contact with the transmission line of the defendant which was along the road. The decedent was not engaged in any work or activity in connection with the transmission line by virtue of any contract or other relationship with the defendant and was not engaged in anything which was in any way in the interest of the defendant.

Likewise, in the case of *Helzer v. Wax*, 127 Or. 427 (1928), it was held that plaintiff, who was engaged in the business of hauling garbage and was injured when removing some rubbish from the premises of the defendant, was not entitled to the protection of the Employers' Liability Act. The Court found that in that case the plaintiff's status was that of a business invitee or independent contractor and the case was remanded for retrial. The facts in that case are very different from those in the present case. The decedent in the present case was not only required to be on the premises of the defendant pursuant to the arrangements between W. R. Francis and the defendant for the delivery of the logs, but he was actually required to engage in work and activity in connection with the unloading of the logs. The work of the defendant's employees and the activity of the decedent while hauling for W. R. Francis were in-

termingled, as was the work of the steamship company employees and the lumber company employees in the *Rorvik* case.

The *Saylor* case and the *Helzer* case were decided before the case of *Coomer v. Supple Investment Co.* and the *Drefs* case, which are quoted above, and which clearly indicate that the protection of the Employers' Liability Act may, under proper circumstances, extend to persons who are not, strictly speaking, employees.

(4) The decedent in the present case was actually a workman engaged in the performance of personal services, and was the type of person that the Employers' Liability Act was intended to protect.

As stated in the case of *Turnidge v. Thompson*:

"The avowed purpose of the statute was to protect working men and working women; and since the statute is remedial it should be liberally construed so as to accomplish its express purpose."

The appellant attempted in the court below, by way of oral argument and not by way of testimony, to label decedent an independent contractor. Now an independent contractor is one who knows no master; he is one who has the sole direction and control of the work he is doing. He gives orders, does not take them. The independent contractor is one "who, exercising an independent employment contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work; one who contracts to perform the work at his own risk and cost, the workmen being his servants, and

he being liable for their misconduct." *Ballentine Law Dictionary*, p. 632 (Workman's Compensation Text, Schneider, Vol. 4, p. 13).

Thus, it will be seen that when the person having the direction and control of the work involving risk and danger is the alleged employee he is ruled an independent contractor and the purported employer is not responsible under the Employers' Liability Act. The independent contractor by fact and definition being the person in direction and control of the work is responsible and he alone. Thus, we find in *Lawton v. Morgan Fliedner & Boyce*, 66 Or. 212, the words "the subcontractor was the person that had the direction and control of Lawton's work. The corporation was not exercising any supervisory care or direction over the premises of the accident, therefore the corporation was not accountable for the injury."

In 114 Or. 451, *Warner v. Synnes*, in determining whether the contractor or owner was responsible, we find the words:

"The reason for making the contractor alone responsible and exonerating the owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of. Where the contractor controls the details of the work, he alone is responsible for an injury to an employee under this Act."

When it is determined that the unloading work was done under the sole direction and control of the appellant Johnson, the question of whether or not the Act applies is settled. The log dump foreman testified with-

out contradiction that he was in charge of the crew in regards to telling the men what time of day to come to work and planning the work to be done and how they were to take care of the logs (T. 112). He stated he was the person who determined which of the three brow logs was to be used (T. 121). The Company posted a set of work rules that all truck drivers and workmen were bound to follow and which were enforced by the boom foreman (T. 262). The engineer had the duty to see that all workmen were in the clear before he dumped his logs in the water (T. 138, 152). The unloading equipment, including the dock, brow log and unloading crane were all owned by appellant Johnson (T. 155). The evidence was uncontradicted that the decedent had no right, power or authority to direct anyone connected with the unloading operation. He could not give orders to the unloading engineer, boom foreman or scaler (T. 285, 286). In fact, the facts showed without contradiction that appellant C. D. Johnson was the sole person having the direction and control of the unloading work. Where there was no question of fact, it then became the duty of the Court to determine, as a matter of law, whether the Employers' Liability Act applied. *Hoag v. Washington-Oregon Corp.*, 75 Or. 588; *Schulte v. Pacific Paper Co.*, 67 Or. 334. The evidence showed that the deceased workman was lawfully on the appellant's property and required to work and expose himself to the hazards of the machinery and appliances of the appellant C. D. Johnson Lumber Corporation, and that the orbit or scope of his employment required that he be about appellant's machinery in the accomplishment of a com-

mon purpose in which the appellant Johnson had an interest; in fact, decedent's contract of employment required that he be exposed to the hazards and danger of appellant's machinery (T. 172). The Act contemplates that in such situations the appellant Johnson owed the deceased a duty to use every device, care and precaution that was practicable to use to protect him; this appellant failed to do. Appellee's decedent was no different from any other truck driver delivering logs to the landing and was entitled to the same protection that appellant owed all workmen at that unloading dock. Decedent's duties were the same as those of 20 other different truck drivers bringing 80 loads of logs daily to be unloaded. If the truck driver were to be the man in control, it would mean that there would be 80 different bosses throughout the day, which would produce a ridiculous and intolerable situation that would effectively prevent any work from being done.

The Court properly instructed the jury that to come under the Employers' Liability Act it first had to find that the work involved a risk or danger. *Williams, et al. v. Clemen's Forest Products*, 188 Or. 572 (1950) (T. 297). Then the Court fully submitted the question of direction and control as to Dean Hutchens, which would of necessity include any independent contractor problem that might be pertinent to this case, as follows (T. 306):

"Of course, if you find that Dean Hutchens made his own working conditions and that the accident and injury resulted from such working conditions which he himself made, then the defendant



is not responsible for such accident or injury and your verdict would be for the defendant \* \* \* .”

Regardless of what may be said with respect to the legal relationship between W. R. Francis and the decedent, whether he was an independent contractor or an employee, it is clear that while engaged in work on the unloading dock, he was subjected to all the hazards of the unloading operation as any other working men would have been. He was required to be there and expose himself to the hazards of the work as a result of a contractual arrangement. The work which he did and the dangers incident thereto were no different in his case than in the case of other drivers working by the hour and driving someone else's truck. The duty imposed upon the appellant, C. D. Johnson Lumber Corporation, should be the same in either case.

Respectfully submitted, this 16th day of August, 1951.

HARRY GEORGE, JR.,  
EMERSON U. SIMS,  
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No. 12914

In The  
**United States Court of Appeals**  
**For the Ninth Circuit**

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellant*,

vs.

KATHLEEN HUTCHENS, *Appellee*.

KATHLEEN HUTCHENS, *Appellant*,

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a Corporation, *Appellee*.

---

Appeal from the District Court of the United States  
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

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**Combined Answer and Reply Briefs of**  
**Cross-Appellee and Appellant**  
**C. D. Johnson Lumber Corporation**

---

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No. 12914

In the

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Appeal from the District Court of the United States  
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

---

**ANSWER BRIEF OF CROSS-APPELLEE  
C. D. JOHNSON LUMBER CORPORATION**

---

**STATEMENT OF THE CASE**

The cross-appellant, Kathleen Hutchens, recovered a \$68,377.20 verdict as the result of the death of her husband while at work. (R. 54) Cross-appellee, C. D. Johnson Lumber Corporation, moved in the alternative for

judgment notwithstanding the verdict and for a new trial. (R. 57-63) In an oral opinion rendered after several months deliberation the court rejected the cross-appellee's contentions that there were errors in the trial of the cause but stated that he was concerned with the size of the verdict. (R. 75)

The court after an analysis of the actuarial data involved concluded that though the verdict was not arrived at as a result of passion and prejudice, it was excessive to the extent of \$21,877.20. (R. 75-6) The court then stated in its opinion that unless the cross-appellant filed a remittitur of that amount, cross-appellee's motion for a new trial would be granted. (R. 76) On December 18, 1950, cross-appellant filed a motion for a reconsideration of the said opinion conditionally denying cross-appellee a new trial. (R. 63)

After having heard argument of counsel and having received briefs, the court overruled the motion to reconsider on February 9, 1951. (R. 66) In an oral opinion the court, citing authority, rejected cross-appellant's contention that a Federal District Court has no power to require a conditional remittitur in a diversity case where the particular state whose law was being enforced denies to the state courts any such power. The court also rejected cross-appellant's contention that the court acted arbitrarily and capriciously in ordering a reduction of the

recovery to \$46,500 as a condition of its denial of a new trial. (R. 77-8)

On February 19, 1951, cross-appellant filed a remittitur of \$21,877.20 of which she now complains. (R. 67) Upon the submission of the remittitur, cross-appellee's motions for a new trial and for judgment notwithstanding the verdict were overruled. (R. 68-9) On March 19, 1951, cross-appellee (as appellant) filed a notice of appeal from the judgment entered on the reduced verdict. (R. 81) Thereafter on March 21, 1951, cross-appellant filed a notice of appeal initiating this cross-appeal.

The questions presented are simple and closely related. First, may this court review the discretion of the court below in determining that a new trial should be granted cross-appellee upon the grounds that the verdict returned was excessive if that excessive verdict was not corrected by a remittitur? Second, if said question is reviewable, was there any abuse of discretion in requiring a remittitur of the size submitted by the cross-appellant?

Third, in a diversity case does the rule of *Erie Railroad Co. v. Tompkins* prevent a Federal court from exercising its traditional power to require a conditional remittitur where the state whose law is being enforced denies its own courts any such power by a constitutional provision? If so, can said provision of the Oregon Consti-

tution providing that no fact tried by a jury shall be reexamined unless the court can affirmatively say that there is no evidence to support the verdict prevail in the Federal courts over the different language of the Seventh Amendment to the United States Constitution?

### **Argument**

**(1) The reviewability on appeal of the District Court's action in allowing cross-appellant to file a remittitur is a question of federal practice and under that practice acceptance of an option to file a remittitur to cure an excessive verdict is not open on appeal.**

(The cross-appellee answers under this heading the argument generally set out under point (1) in cross-appellant's brief from pages 13 through 19.)

The question whether the District Court's action in granting the cross-appellant Hutchens an option to file a remittitur is properly before this court is a procedural question governed by Federal practice and the Federal Rules of Civil Procedure. Cross-appellant, nevertheless, on this point relies solely on state cases.

The Circuit Court of Appeals for the Fourth Circuit has held:

“The practice which we must follow on appeal, however, is the federal and not the state practice.”

*United States v. Marsh*, 108 F. 2d 558, 559.

In that case the court rejected the contention that it had to give unusual weight to the fact that two juries had decided in favor of the plaintiff as was the case under Virginia practice.

The Fifth Circuit has held that:

“\* \* \* all questions of preserving and assigning errors, and whether an error is harmless or reversible, are matters of procedure, and in regard to such matters, this court is governed by the rules of practice and procedure in the Federal Court rather than by those in the State Court.” *Dallas Ry. & Terminal Co. vs. Sullivan*, 108 F. 2d 581, 583.

See also *Carneige Nat. Bank v. City of Wolf Point*, 110 F. 2d 569, 572, and *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, 302.

Under the federal practice the cross-appellant cannot raise on appeal her acceptance of the option given by the trial court to file a remittitur. The leading case is *Woodworth v. Chesbrough*, 244 U.S. 79, 37 Sup. Ct. 583, 61 L.Ed. 1005. The headnote in the official report states the holding as follows:

“Finding a verdict and judgment excessive, the Court of Appeals gave the party who had recovered them his option to submit to a reversal or obtain an affirmance by remitting part of the judgment. The party having acted on the latter alternative, *Held*, that his cross writ of error complaining of the reduction must be dismissed.”

This case was followed in *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, 302, where the court held “that the trial judge’s action in requiring remittitur as a condition of denying motion for a new trial is not reviewable.” (p. 302) This result was reached although the Conformity Act was then in effect and there was a state statute to the contrary involved. Another Circuit Court of Appeals reached the same result without reference to the earlier decisions. *Chickasha Cotton Oil Co. v Chapman*, 4 F. 2d 319, 321. The court held that the party submitting the remittitur below “precluded themselves from seeking a review at the hands of this court.” (p. 321)

All three of the earlier cases were cited by Judge Learned Hand in *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904. He clearly suggests that the acceptance by the plaintiff of a reduced judgment was not appealable. (It should be noted that the last sentence of the opinion is apparently garbled and “bettered” was inserted where the judge apparently meant “worsened.”)

**A Federal trial court may properly require a remittitur of part of an excessive verdict as a condition for the denial of a motion for a new trial.**

In *Northern Pacific R.R. Co. v Herbert*, 116 U.S. 642, 646, 6 Sup. Ct. 590, 29 L. Ed. 755, the court held:



“2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It was held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. (citations)”

The power of a federal court to conditionally require a remittitur was reaffirmed in *Dimick v. Schiedt*, 293 U.S. 474, 483, 55 Sup. Ct. 296, 79 L.Ed. 603, where authorities are collected. A recent case relied on by the court below and which applied the rule laid down by the above two cases is: *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002.

After a thorough review of the authorities the court there concluded that it had the authority and perhaps the duty “to require a remittitur of the excessive portion of a jury’s verdict as a condition to the denial of a new trial.” and it exercised that authority. (p. 1008) Other recent cases approving requiring a remittitur as a condition to overruling a motion for a new trial are: *Fornwalt v. Reading Co.*, 79 F. Supp. 921 and *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904.

The cross-appellant complains of “duress” but is well established that asserting a legal right is not duress. *Chatfield v. Seattle*, 198 Wash. 179, 189, 88 P. 2d 582, 121 A. L. R. 1279. The court below had a legal right to present the cross-appellant with the following alternative: either to have a new trial or to remit enough of the verdict to cure the error inherent therein. The corrected verdict could stand. *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642, 646, 6 Sup. Ct. 590, 29 L.Ed. 755. The cross-appellant is in the somewhat anomalous position of having secured a judgment against “the appellee, and yet seeking to retract the condition upon which it was obtained.” *Woodworth v. Chesbrough*, 244 U.S. 79, 82, 27 Sup. Ct. 583, 61 L.Ed. 1005.

**Cross-appellant’s attempted qualification of her remittitur is of no effect.**

The inconsistency of the cross-appellant’s position is not aided by the fact that she made an effort in her remittitur to escape the necessary consequences of her election by asserting:

“This remittitur is filed without prejudice, in the event the defendant appeals from the judgment entered pursuant to such remittitur, to the rights of the plaintiff to appeal the action of the court in

conditioning its order denying the motion for new trial upon the filing of such remittitur.” (R. 67)

The United States Supreme Court was presented with the same sort of attempt in *Woodworth v. Chesbrough*, *supra*. The remittitur is quoted in the opinion of the Supreme Court and states it was given in compliance within the opinion of the Circuit Court of Appeals:

“ “ \* \* \* for the sole purpose of obtaining the entry of final judgment herein, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceedings follows and continues to be in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals.’ ” (p. 80)

It is clear that cross-appellant’s effort to qualify her remittitur is ineffective because the even more elaborate attempt in *Chesbrough v. Woodworth*, *supra*, was ineffective. The United States Supreme Court there held that the party remitting was bound by his election. Here the cross-appellant consented to file her remittitur as an alternative to a new trial.

**(2) The trial court had the right to require the particular remittitur it did.**

(The cross-appellee answers under this heading the argument generally set out under point (2) in cross-appellant's brief from pages 19 through 22.)

The court's opinion makes clear the precise position taken:

"I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberation or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that, when the verdict of the jury is clearly excessive, it is the duty of the trial judge to refuse to permit such an award to stand.

"I have carefully considered all of the evidence touching upon damages and I believe that the verdict of the jury is excessive to the extent of \$21,877.20." (R. 76)

The issue is very narrow: did the court err in requiring a remittitur upon the grounds that the verdict was excessive? The trial court would have committed error had it allowed a remittitur if the verdict was the

result of passion and prejudice. It is only when the verdict is simply excessive that the trial court may allow a remittitur instead of ordering a new trial. *Minneapolis, St. Paul & Sault St. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243. That case arose in a state court and involved the Federal Employers' Liability Act. A recent case following the rule there announced is: *Fornwalt v. Reading Co.*, 79 F. Supp. 921, 924.

The same rule has been applied in the following diversity cases. In *Brabham v. State of Mississippi*, 96 F. 2d 210, the court said:

“We understand that while mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudices, however natural the resentment which arouses it, may not be so cured.” (p. 214)

The same result was reached in *National Surety Co. v. Jean*, 61 F. 2d 197. In *McCown v. Boone*, 154 F. 2d 19, the United States Court of Appeals for the District of Columbia held that a remittitur was properly required because the trial judge ruled only that the damages were excessive, not that the verdict showed passion or prejudice.

The burden of cross-appellant's attack is on the

claimed difficulties of the trial court in reducing a verdict for wrongful death. It may be conceded that "where damages are unliquidated and there is no fixed measure of mathematical certainty, courts are reluctant to disturb a jury's verdict on the ground of excessiveness, particularly in tort actions for personal injury." *Fornwalt v. Reading Co.*, 79 F. Supp. 921, headnote 2. The court below recognized that a trial judge should only rarely and reluctantly disturb the jury's findings with respect to damages. (R. 76)

There is, however, no question that the trial court could, as it did, require a remittitur to cure an excessive verdict in a *tort* action. In the case of *Northern Pacific R. R. Co. v Herbert*, 116 U.S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, the court held that the trial court had properly required a remittitur of \$15,000 of a \$25,000 verdict given a brakeman for the loss of a leg. The case arose prior to the enactment of the Federal Employers' Liability Act and involved the effect of certain North Dakota statutes just as the Oregon Employers' Liability Act is involved here.

The case of *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002, was the model for the opinion of the court below and is squarely in point. The court there said:

"Having determined that the verdict, though not the result of passion or prejudice, controlling or

influencing the jury's deliberation and not shocking to the court's conscience, is, nevertheless, excessive to the extent of \$4,000.00, \* \* \*” (p. 1008)

The court then proceeded to enter an order requiring a remittitur as a condition of avoiding a new trial.

Cross-appellant contends that the court below erred in that it had no basis to apportion the verdict and thereby to determine the size of the remittitur. In the Rice case a young woman had been injured in a grade crossing accident and bore scars as a result. The court there cut down an \$11,000.00 verdict to \$7,000.00, yet only approximately \$1,000.00 of each of those verdicts could be attributed to established expenses. The court did not diminish damages on the basis of comparative negligence, but instead reduced unliquidated damages for pain and suffering, disfigurement, and impairment of earning capacity. (p. 1006) The court there had no more mathematical basis than the trial court in the Northern Pacific case. In each case the judge simply decided that the verdict was excessive and reduced it.

In each of the following cases involving unliquidated damages the court held that a remittitur should be filed unless a new trial was to be had despite the fact that in no case did any mathematical basis for apportionment

exist. The courts simply felt that the verdicts were excessive or extravagant and ordered a remittitur:

*Cole v. Chicago, St. P.M. & O. Ry. Co.*, 59 F. Supp. 433, (personal injury; \$58,725.25 verdict; \$15,000.00 remittitur).

*Fornwalt v. Reading Co.*, 79 F. Supp. 921 (personal injury under Federal Employers' Liability Act; \$15,000 verdict; \$7,500 remittitur).

*Daigneau v. Grand Trunk Ry. Co.*, 153 Fed. 593 (personal injury; \$6,500 verdict; \$2,000 remittitur).

*Mattox v. News Syndicate Co.*, 176 F. 2d 897 (libel; \$20,000 verdict; \$5,000 remittitur)

*McCown v. Boone*, 154 F. 2d 19 (libel; \$7,500 verdict; \$5,000 remittitur).

Finally in *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, a wrongful death action, the court held that the trial court did not err in requiring half of the \$10,000 verdict to be remitted simply on the ground that it was "excessive." (p. 302) The authorities cited show that the Federal courts will on proper occasions impose lump sum remittiturs in unliquidated damage cases.

A wrongful death case presents less difficulty to the court in computing a proper remittitur than a personal injury case. A personal injury case involves fixing a sum for pain and suffering, a subjective experience



of the injured person, and an estimate of the degree of disability suffered. The latter may be ascertained approximately with the help of expert testimony, but there is also involved a further estimate of the probable duration and future amount of disability, that is often a difficult problem even for experts. The estimate of disability must then be related to the kind of and pay for the work the injured man may be able to do in the future.

In a wrongful death case the court is presented with a problem which can be solved by actuarial methods. Depending on the rule of damages adopted it is only necessary in general to ascertain the life expectancy of either the beneficiary or the person killed and by actuarial computation figure a lump sum based on the dead person's earning capacity or the beneficiary's share thereof.

Here the court's objection to the size of the verdict was based on the fact that the pecuniary loss to the wife is not to be measured by the full net earnings of the husband. (R. 76) Counsel in their brief base their calculations on an assumption that if a man earns \$3,000 a year net then his wife's share thereof is \$3,000. (Brief 21) That assumption is unjustified under the Oregon Employers' Liability Act. The proper measure of damages is stated in *Hansen v. Hayes*, 175 Or. 358, 388, 154 P. 2d 202.

The remittitur imposed is a reasonable one since it must have been based on some such calculation as the following. The average net income of the decedent for the last two years of his life would be about \$2,046. (This figure is reached by increasing the 1949 eight months income up to the probable twelve months income.) Assume that the wife's share of the same would be two-thirds, or \$1364. That net income to the wife when applied to the actuarial formula presented at the trial would yield a verdict of approximately \$46,262.

That is close to the verdict of \$46,500 which the court thought proper. The \$46,262 would have to be increased by the \$974.71 for funeral expenses. Counsel object to the exactness of remittitur being \$21,877.20 but it is obvious that the court found a proper verdict to be the round sum of \$46,500 and then subtracted the same from the original verdict of \$68,377.20. The authorities previously cited sustain the requirement of round sum remittiturs in situations when no real basis of calculation exist and the courts merely determine the verdicts to be excessive. Here the court had adequate mathematical materials with which to properly reduce the excessive verdict in view of a principle of law which was ignored: pecuniary loss to the wife is not measured by the full net earnings of the husband.

**(3) The right of a Federal District Court to require a remittitur as a condition for avoiding a new trial is procedural matter and on a preceudural matter the state rule is not binding on the Federal courts which must follow the Federal Rules of Civil Procedure. Particularly is this so when to follow a state rule of procedure would be to violate the Seventh Amendment to the United States Constitution.**

(The cross-appellee answers under this heading the argument generally set out under point (3) in cross-appellant's brief from pages 22 through 32.)

Cross-appellant seems to assume that her substantive rights under the Oregon Employers' Liability Act are infringed by the District Court's exercise of its firmly established right to require a remittitur as an alternative to a new trial. Cross-appellant ignores Rule 59 a. of the Federal Rules of Civil Procedure which provides in part that:

“A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; \* \* \*”

The power of a federal court to require a remittitur as an alternative to a new trial has been reaffirmed

since the promulgation of the rules. *Fornwalt v. Reading Co.*, 79 F. Supp. 921; *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904. This court has recognized that the right of the trial court to condition a new trial upon reduction of the verdict is sanctioned by Rule 59 of the Rules. *United States v. Fotopulos*, 180 F. 2d 631, 639 (citing authorities).

Finally, the court in *Rice v. Union Pacific R. Co.* 82 F. Supp. 1002, a remittitur case, specifically observes that the Federal Rules of Civil Procedure have reaffirmed "the applicability on this occasion of federal decisions on the point announced before the effective date of the rules. (citations)." (p. 1008) The rules have the force and effect of a Federal statute. *John R. Alley & Co. v. Federal Nat. Bank*, 124 F. 2d 995; *Windor v. Daumit*, 179 F. 2d 475. In the *Erie Railroad Co.* case the court excepted matters governed by Federal statutes from the operation of the rule announced, saying:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 Sup. Ct. 817.

**The action of the Court in allowing a remittitur as an alternative to a new trial is a procedural matter.**

The Rules govern practice and procedure in the Federal courts. The right of the trial court to order a new trial is a procedural question. This court in *Murphy v. United States District Court etc.*, 145 F. 2d 1018, 1020, *cert. dismissed per stipulation*, 325 U.S. 891, 89 L. Ed. 2003, 65 Sup. Ct. 1090 held:

“On motions for new trial, federal courts are not affected by the conformity statute nor state statutes or practice. The exercise of the court’s discretion in passing on a motion for a new trial is a rule of law established by the Supreme Court of the United States and is not controlled by the ‘Conformity Act’ nor affected by any state statute on the subject.”

The Circuit Court of Appeals for the Fourth Circuit has held:

“The motion to set aside the verdict and grant a new trial was a matter of federal procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice.” *Aetna Casualty & Surety Co. v. Yealts*, 122 F. 2d 350, 352; *California Fruit Exchange v. Henry*, 89 F. Supp. 580, 590, *aff’d* 184 F. 2d 517.

There can be no question in view of the foregoing authorities that had the trial court simply ordered a new

trial in this cause the cross-appellant's rights would be controlled by the Federal Rules and not by state law. What the trial court actually did was less prejudicial to the cross-appellant than granting a new trial. Instead of absolutely ordering a new trial the trial court allowed cross-appellant to file a remittitur as an alternative.

The action of the court in so doing was no less a procedural action than absolutely ordering a new trial. Particularly is this so when it is well recognized that a new trial may be granted for excessive damages. As this court stated in *Murphy v. United States District Court, etc.*, 145 F. 2d, 1018, 1020:

“A Federal District Judge not only has the power and authority but is charged with the duty and responsibility to set aside the verdict of a jury and to grant a new trial when in his judgment and discretion the amount of compensation awarded is excessive. The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just. (citations)”

Since granting a new trial for an excessive verdict is a procedural question, it is clear that allowing an alternative to such action, a remittitur, is also procedural.

**The uniform result test of *Erie Railroad Co. v. Tompkins* does not apply to the case at bar.**

Cross-appellant seems to contend, however, that since this is a diversity case that the result should have been exactly the same had the suit been brought in the Oregon courts. There are several fallacies in that argument.

First that argument overlooks the fact that the Federal courts have required remittiturs in diversity cases since the Erie Railroad rule was announced: *Mattox v. News Syndicate Co.*, 176 F. 2d 897; *Whitham Const. Co. v. Remer*, 105 F. 2d 371; *Raske v. Raske*, 92 F. Supp. 348; *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002; *Cole v. Chicago, St. P. M. & O. Ry. Co.*, 59 F. Supp. 443. (The last four cases seem to be clearly diversity cases although the opinions do not affirmatively so state.)

A case which implicitly recognizes the federal supremacy in a situation much like the case at bar is *Burris v. American Chicle Co.*, 120 F. 2d 218. In that case a window cleaner was injured while working. Suit brought under Sec. 202 of the Labor Law of the State of New York and the rules of the Industrial Board of the Department of Labor of the State of New York promulgated thereunder. Section 202 provided in part:

“On every public building where the windows are cleaned from the outside, the owner, lessee, agent, manager or superintendent in charge of such building shall provide, equip and maintain approved

safety devices on all windows of such building \* \* \*"  
 Consol. Laws, c. 31, *Burris v. American Chicle Co.*,  
*supra*, 221.

The rules of the Industrial Board provided in part:

"All scaffolds and their supports shall be properly constructed and of ample strength to support safely the maximum number of men plus the weight of the material to be placed on them." *Burris v. American Chicle Co.*, *supra*, 221.

This language is reminiscent in certain respects of the Oregon Employers' Liability Act involved in this action. In that action plaintiff obtained a verdict for \$35,000. Defendant moved to set verdict aside as excessive and for a new trial. The granting of the motion was prevented by plaintiff's stipulation that judgment might be entered for the reduced amount of \$20,000. All parties appealed, plaintiff appealing on the basis of Sec. 584-a of the New York Civil Practice Act. That section granted to New York appellate courts the power to review a stipulated reduction in the verdict and to increase the judgment allowed up to the amount of the original verdict. Despite the existence of this explicit New York statutory right to review a reduction in the verdict, the Second Circuit applied the federal rule as to review of such matters. (p. 223)



In *Palmer v. Miller*, 60 F. Supp. 710, the court deemed the common law controlling and granted a new trial irrespective of a Missouri statutory rule forbidding more than one new trial on the ground that verdict is against the weight of the evidence.

The cases are fatal to cross-appellant's contention which seems to be: cross-appellant brought suit under the Oregon Employers' Liability Act. The Oregon Constitution, Amended Article VII, §3, prevents any remittitur in a case like this. Since the Erie Railroad rule sets as a goal a general uniformity of result despite a choice of different forums, *therefore* the court below erred in imposing such a remittitur. But the American Chicle Company case and the Palmer case show that the Federal rule is controlling here.

Just as the court in the American Chicle Co. case refused to follow a statutory rule regulating New York appellate practice so also here should this court refuse to follow the unique practice rule imposed upon the Oregon courts by the Oregon Constitution. Just as the court in the Palmer case deemed itself bound by the common law rule allowing an unlimited number of new trials despite the contrary Missouri statute so also here should the action of the trial court in requiring a conditional remittitur to be governed by the common law rule and not by the provision of the Oregon Constitution

modifying the common law. *Van Lom v. Schneiderman*, 187 Or. 89, 99, 210 P. 2d 461.

**The Seventh Amendment to the United States Constitution is controlling here.**

The guiding principles for this appeal are to be found in Rule 59-a where the United States Supreme Court, acting with the power of Congress, has declared that new trials may be granted for any of the reasons for which new trials had been granted prior to the promulgation of the rules. The rule refers us to the pre-existing Federal practice, and that preexisting practice as to conditional new trials and remittiturs was based upon the Seventh Amendment to the United States Constitution.

That Amendment provides that:

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

This language is controlling upon the Federal courts and not the clauses which may be found in the forty-

eight state constitutions. That language controls here rather than the first sentence of Amended Article VII, §3, of the Oregon Constitution which reads:

“In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.” 9 O.C.-L.A. p. 224.

Cross-appellant relies heavily on *Van Lom v. Schneiderman*, 187 Or. 89, 210 P. 2d 461. In that case the court after having quoted the language of the Oregon Constitution just referred to, states:

“It will be observed that the first sentence of Art. VII, §3, departs somewhat from the language of Art. I, §17, of the Oregon Constitution and follows closely the language of the federal guaranty up to the last phrase. The Federal Constitution says that ‘no fact tried by a jury shall be otherwise re-examined in any court of the United States, *than according to the rules of the common law*,’ our present Consitution says ‘that no fact tried by a jury shall be otherwise re-examined in any court of this State, *unless the court can affirmatively say there is no evidence to support the verdict*.’ The Supreme Court of the United States holds that, ‘according to the course of the common law,’ a trial court may set aside a verdict which it deems excessive and order a new trial, but that an appellate court has no authority to review the refusal of the trial court to do so.

*New York Central & Hudson River R. R. Co. v. Fra-loff* (1879), *supra*. And see *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 57 L. Ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D 1029. The same rule prevailed in this state prior to the adoption of Art. VII, §3. The federal and Oregon cases are cited in the *Hust* case, *supra*, 180 Or. 430, 431. As stated by the Supreme Court in the *New York Central* case:

“\* \* \* \* If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. \* \* \* Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.’

“It may be assumed that the framers of Art. VII, §3, were not unacquainted with the construction which the Supreme Court of the United States had theretofore placed upon the Seventh Amendment of the Federal Constitution; and it is evident that, while following faithfully the language of the first part of the Seventh Amendment, they deliberately rejected the common law exception therein. When they substituted in the place of that exception the words, ‘unless the court can affirmatively say there is no evidence to support the verdict,’ they in effect declared their purpose to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence.” (pp. 98-99)

Counsel for cross-appellant in effect asked this court to eliminate as in incident of a jury trial in a Federal court "the common law power of a trial court to re-examine the evidence and set aside a verdict because it is excessive or in any other respect opposed to the weight of the evidence." To do so would be to abridge the right of the cross-appellee to a jury trial in accordance with the rules of the common law as guaranteed by the Seventh Amendment.

To do so would be to adopt by judicial action a constitutional rule which the Oregon court itself has scathingly criticized. *Williams v. Clemen's Forest Prod., Inc.*, 188 Or. 572, 216 P. 2d 241, 217 P. 2d 252, was a case arising under the Oregon Employers' Liability Act. The court said:

"This case may be one of great hardship to the plaintiffs. The result will be particularly harsh if the plaintiffs are denied the \$5,000 in insurance which the plaintiff Dayle L. Williams at one time elected to accept under the terms of a policy secured by the defendant company. We are constrained to say that if the courts had not been stripped of the statutory powers which they possessed at common law and under statute, (O.C.L., §5-802) we would have upheld the order of the trial court granting a new trial upon the authority of that statute, and of such decisions as *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 89 P. 389, and earlier cases which are cited in the annotations to O.C.L.A., §5-802. Article VII, section 3 of the constitution adopted since those cases were decided, has deprived the

trial court of the power by granting a new trial, to do justice in this case in which we think the evidence strongly preponderated in favor of the plaintiffs on the issue of risk and danger. Under the constitutional provision, 'no fact tried by a jury shall be otherwise re-examined in any court \* \* \* unless \* \* \* there is no evidence to support the verdict.' when an exorbitant verdict has been rendered for a plaintiff on flimsy testimony despite an overwhelming weight of evidence to the contrary, the impotence of the court to correct the injustice has generally been met with complacency. This case demonstrates that the constitutional provision cuts both ways." (pp. 603-4)

Counsel invites this court to adopt a rule which is recognized nowhere else: "Oregon today occupies in this respect a lonely eminence." *Van Lom v. Schneiderman*, 187 Or. 89, 113, 210 P. 2d 461. In the latter case strongly relied on by cross-appellant the court concludes its reexamination of the difficulties caused by the constitutional provision as follows:

"Whatever our individual opinions may be about the policy involved in Art. VII, §3, we have no right or authority to subvert its obvious purpose or to refuse to apply its provisions to the full extent of their evident meaning. The people may be misled; they may, through ill-considered legislation, bring on themselves evils worse than those they hope to cure; but it is not the business of a court to attempt to save them from the consequences of what it may conceive to be a misguided policy by ignoring or

misinterpreting their expressed will. This is so even though we should think that a system of trial by jury in which the judge is reduced to the status of a mere monitor cannot be expected to survive.” (p. 113)

The Seventh Amendment to the United States Constitution does not allow a federal judge to be “reduced to the status of a mere monitor.”

**The Oregon court’s characterization of the relation of judge and jury is not controlling on the Federal courts in this case.**

Counsel relies on *Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409, 177 P. 2d 429, but a state court’s classification of a matter as procedural or substantive within the meaning of the Erie rule is not binding on the Federal courts. *Rogers v. American Employers’ Ins. Co.*, 61 F. Supp. 142. This is not a conflict of law case where the Federal court must follow the characterization by a state court of a matter as substantive in determining the applicable law.

The Oregon court in the *Hust case* was obliged to classify the relationship between judge and jury as substantive to avoid having to apply its own unfortunate constitutional rule: the court could thereby remand the

case to the circuit court which might require a remittitur as an alternative to a new trial. Hust, *supra*, 436. The rule of *Erie Railroad Co. v. Tompkins* is not in point because "the division of function between court and jury in a federal court is to be made by federal, not state law." *Ettelson v. Metropolitan Life Ins. Co.*, 137 F. 2d 62, 65, *cert. den.* 320 U.S. 777, 88 L. Ed. 467, 64 Sup. Ct. 92; *followed in Logan v. Holman*, 7 F.R.D. 596.

This case is similar to *Belanger v. Great American Indemnity Co.*, 89 F. Supp. 736. There the court recognized that in diversity cases that it was obliged to follow decisions of the courts of last resort in the state where sitting. The court, however, also held where a defense is made based on the Constitution of the United States it cannot follow the state courts but must be guided by the decisions of the Federal courts. Here cross-appellee's defense was not based on the Constitution but it was entitled to the sort of jury trial guaranteed by the Seventh Amendment. Jury trial in the Federal courts has always included a right to correct the mistakes of a jury in returning an excessive verdict by requiring a conditional remittitur.

The case at bar is relatively simple if undue attention is not given to labeling this constitutional right to a remittitur in proper cases as either "substantive" or "procedural." On one side we have the declared policy of



Oregon drastically changing common law jury trial and reluctantly enforced by its judges; on the other we have the Federal Rules of Civil Procedure having the effect of a Federal statute implementing the Seventh Amendment to the United States Constitution. The necessary choice for a Federal court is obvious.

### **Appellant recovered upon a common law right.**

Counsel's argument that the Oregon Constitution should be followed is based on the mistaken assumption that cross-appellant was here attempting to enforce "a statutory right of action which did not exist at common law." That assumption is mistaken. Counsel relies on *Piukkula v. Pillsbury-Astoria Flour Mills*, 150 Or. 304, 42 P. 2d 921, 44 P. 2d 162. That case simply held that the Employers' Liability Act is not a survival statute, but creates a new cause of action which accrues only upon death. *Hansen v. Hayes*, 175 Or. 358, 154 P. 2d 202.

The requirements of the Act are simply expressions in detail of the common law rule that it is a non-delegable duty of the employer to furnish a reasonably safe place in which a servant is to work. *Dickerson v. Eastern & Western L. Co.*, 79 Or. 281, 287, 155 Pac. 175. As the court stated in *Olds v. Olds*, 88 Or. 209, 214, 171 Pac. 1046:

“The Employers’ Liability Act of Oregon is a modified form of the common-law remedy, whereby an employee is permitted to recover from an employer damages for a personal injury which was caused by the latter’s negligence.”

No detailed analysis of all cases cited by cross-appellant is made here because upon inspection of cross-appellant’s brief it will be seen that they are concerned with other problems than that of a conditional remittitur. *Palmer v. Moran*, 44 F. Supp. 704, seems to be the only Federal case involving a remittitur which is cited and is not contrary to cross-appellee’s position. The court in granting a remittitur cited several Federal cases. It also cited “Standard Pennsylvania Practice” which is apparently a practice book and not a statute as cross-appellant asserts. (Brief, 27)

Two United States Supreme Court cases involving the Federal Employers’ Liability Act are cited by cross-appellant, *Brown v. Western Railway of Alabama*, 338 U.S. 294, 94 L. Ed. 100, 70 Sup. Ct. 105, and *Brady, Administratrix v. Southern Railway Co.* 320 U.S. 476, 88 L. Ed. 239, 64 Sup. Ct. 232. But these cases recognize that a federal right cannot be defeated by the forms of local practice. That is the rationale of the decision in *Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409, 177

P. 2d 429. Nor can here the right of the appellee to the sort of jury trial provided by the Seventh Amendment be defeated by Oregon practice.

This case cannot be decided upon the basis of generalities about the Erie Railroad rule. Here the specific factor of the Seventh Amendment is directly involved and is controlling. The Erie case itself denies the application of its rule to cases controlled by the Federal statutes and the Federal Constitution. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 Sup. Ct. 817.

### CONCLUSION

In conclusion it is submitted that the foregoing argument and the authorities cited therein demonstrate that the cross-appellant's specifications of error are not supported by either reason or authority. There being no error, cross-appellee prays that this cross-appeal be dismissed.

Respectfully submitted,

JAMES ARTHUR POWERS,  
NORMAN N. GRIFFITH

## **REPLY BRIEF OF APPELLANT C. D. JOHNSON LUMBER CORPORATION**

### **REPLY TO APPELLEE KATHLEEN HUTCHENS' ANSWER TO SPECIFICATIONS OF ERROR I THROUGH X**

Appellee contends that Appellant failed to comply with the following part of Rule 19(6) of this court:

“ \* \* \* the appellant\* or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely. \* \* \* ”

Appellee cites *Williams v. Dodd*, 163 F. 2d 724, but in that case this court refused to consider points which apparently were totally absent from the statement of points filed in that case.

That is not the case here. In this appeal, every point which appellant has argued in its brief was included in its statement of points, which was served on appellee and filed with this court (R. 83-5). The statement of points naturally differs in form from the specifications of error set out in appellant's brief because this court has imposed two different requirements by its Rules 19 and 20. If appellant was required to follow the form for a specification of error in the statement of points, the Rules would so state.

The requirements for a specification of error are set out in detail by Rule 20 (2d) relating to briefs. The requirement of a statement of points is found in Rule 19 relating to printing records. Statement of points are to be concise, that is, not so detailed as a specification of error. As is stated in O'Brien, *Manual of Federal Appellate Procedure*, (3rd Ed. 1941) 207:

“Moreover, the Statement of Points to be Relied upon in civil cases and criminal cases is not to be treated as sufficient compliance with the Rule requiring detailed Specifications of Error. The Statement of Points indicate in a general manner the points intended to be relied upon, merely informative to counsel opposed and guiding, in a measure, as to the contents of the record on appeal.”

As a reading of the whole of Rule 19(6) shows, the purpose of the statement of points is to insure that the appellee is sufficiently warned of the issues so that he may designate additional parts of the record for printing to aid in presenting his defenses.

In this case the appellant designated the whole record for printing including the evidence with three exceptions which are not material. First, pursuant to stipulation of parties and order of this court various exhibits were not printed but are before this court in their original form (R. 329-331). Second, appellant did not

designate for printing matters in the record relating to the cross appeal; appellee Hutchens did (R. 329). Third, appellant did not designate the entire pre-trial conference proceedings; appellee Hutchens, however, designated additional parts for printing (R. 329). Indeed, the appellee below designated as part of the record all of the pre-trial proceedings not designated by the appellant (R. 89).

In short, the entire pertinent record is before this court. Appellee does not complain nor could she that the statements of points did not sufficiently inform her with the result that she failed to designate more of the record for printing. Everything necessary was printed.

Appellee contends that appellant's brief "appears to contain matters not found in the Statement of Points," but does not favor this court with any particular instances (Brief, 2). The trivialness of the appellee's objections are illustrated by her objection that the statement of points do not correspond with the specifications of error of like numbers. In the interest of systematic argument and avoidance of repetition, the specifications of error were given different numbers than the corresponding appeal points; but in each case there is a note at the end of the specification of error to the exact appeal point covered. For example at page 8 of appellant's brief, it is stated of Specification of Error I:

“Said specification of error covers questions raised by Appeal Point 2.”

When the specifications of error are compared with the designated appeal points, it will be seen that the specifications faithfully follow the points although, of course, as the rules of this court require, they differ in form.

### **REPLY TO ANSWER TO SPECIFICATION OF ERROR III**

In reply to appellee's answer to Specification of Error III, it must be noted that appellee's counsel conceded that the ruling of the commission determined that decedent was an independent contractor under the circumstances of this case:

“Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

“Mr. Powers: I don't know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

“Mr. Babcock: I don't contend, except that that fact is entirely immaterial to this proceeding.” (R. 98).

Appellee relies on O.C.L.A. § 102-1729 to exclude this ruling here. The pertinent text states:

“\* \* \*. In any third party action brought pursuant

to the provisions of this act, the fact that the injured workman or his beneficiaries are entitled to or have received benefits under the provisions of this act shall not be pleaded or admissible in evidence. A challenge of the right to bring such third party action shall be made by supplemental pleadings only and such challenge shall be determined by the court as a matter of law. \* \* \*

The said words of the statute restrict its application to cases where a "workman or his beneficiaries are entitled to or have received benefits." Here it was determined that the decedent was *not* entitled to benefits and hence did not receive any benefits. The words of the statute do not extend to the case where the fact is one of exclusion rather than inclusion.

That is also the preferred construction under the policy of the statute, O.C.L.A. § 102-1729 deals generally with the right of the workman to take the statutory benefits or to proceed otherwise. The general purpose of the section is to insure that the workman will receive as a minimum the statutory compensation. If possible, he is to get more either by suing himself or else getting the net gain which the commission obtains by suing on his behalf. Since the purpose of this section is to allow an election to increase recovery above the statutory benefits, it is obvious that awards made by the commis-



sion should not be pleaded or admissible in evidence for to do so would be to defeat the purpose of the section. And as has been pointed out, that is exactly what the words of the statute provide for.

Furthermore, the second sentence quoted from O.C.L.A. § 102-1729 is not pertinent here. The only issue so far as the commission ruling is concerned is whether or not it is admissible as evidence of decedent's employment status, since it is appellant's theory that the employment status of the person injured is one factor in determining whether the Oregon Employers' Liability Act may be invoked by the appellee.

Appellee contends that this determination of the commission is hearsay, but makes no effort to meet the large group of authorities cited in appellant's brief in support of the admissibility of this ruling. Appellee does attempt to distinguish the Washington cases cited by contending that in Washington, "the Commission is a fact-finding body, and its decision may be upset only on a failure of evidence to support the findings." (Brief, 3). Appellee cites no authority, and her view is incorrect; in both Oregon and Washington the statutes provide for trial de novo in the superior or circuit courts. Rem. Rev. Stat., § 7697; O.C.L.A. § 102-1774. Appellee relies on *Tice v. State Industrial Accident Commission*, 183 Or. 593, 605-7, 195 P. 2d 188, which recognizes that the

provision allowing any fact question in the trial de novo to be determined by a jury in effect sets up a special kind of review of administrative decisions. That is also the law in Washington.

Remington's Revised Statutes, § 7697-2, *Jury trial on appeal—De novo trial—Effect*, provides:

“In all appeals to the superior court from any order, decision or award of the joint board of the Department of Labor and Industries, either party shall be entitled to a trial by jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. In any such appeal the trial shall be de novo and no party to the appeal shall be permitted to introduce evidence in court in addition to that contained in the departmental record.”

That statute should be compared with the following parts of O.C.L.A. §102-1774 upon which the Tice decision is based.

Upon appeal to the circuit court, it provides:

“The case thereafter shall proceed as other civil cases in said court; provided, that either party thereto may demand a jury trial upon any question of fact.  
\* \* \*

“If the court shall determine that the commission has acted within its power and has correctly construed the law and facts, the decision of the commis-

sion shall be confirmed; otherwise, it shall be reversed or modified; provided, however, that in case of any trial of fact by a jury, the court shall be bound by the decision of the jury as to the question of fact submitted to it. \* \* \*

(In addition to these specific analogies it should be noted that Rem. Rev. Stat., §7697, §7697-2, and O.C.L.A. § 102-1773, § 102-1774 cover the same ground and are closely analogous.)

Contrary to appellee's assertion, the Oregon commission is a body authorized to determine the facts in a case presented to it. The following synopsis is a general summary of the procedure under the Oregon statute. Claims are initially investigated and determined by the commission staff. "The Commission shall have full power and authority to hear and determine all questions within its jurisdiction." O.C.L.A. 102-1773.

After the initial determination is made, the claimant is notified of the decision by mail. If the claimant is dissatisfied, he may file a petition for a "rehearing." That is actually his first hearing. At the "rehearing" the claimant may be represented by counsel and present witnesses. The commission does not usually present witnesses. The claimant who is usually the sole witness is examined by his attorney in the presence of a hearing

officer. The hearing officer may question the claimant or other witnesses. A stenographic transcript of the proceedings is made and forwarded to the Commission itself for decision. When the Commission's final order has been made, the claimant may appeal to the circuit court.

“Upon such appeal the plaintiff may raise only such issues of law or facts as were properly included in his application for rehearing.” O.C.L.A. § 102-1774. The commission may file with the court “findings, orders, awards or decision of the commission, which may be necessary in the trial of the case, and which, upon being so filed, shall become a part of the records in such case.” O.C.L.A. § 102-1774.

The fact that the statutory scheme of review of commission awards provides for trial de novo with a trial by jury does not destroy the various “findings” of the commission since they are administrative determinations which stand if no trial de novo is had. They determine claimant's rights unless set aside on appeal. The fact that an administrative determination may be reopened by a court is a factor going to the weight rather than the admissibility of commission rulings. Here the court below erroneously excluded the ruling in point, thereby depriving it of any weight whatsoever. The Oregon

commission, like the Washington “commission”, does determine facts, and those determinations are admissible under the authorities cited. Appellee does not even attempt to challenge any of the appellant’s other authorities under this specification.

In regard to Specification of Error VI, appellant does not contend that decedent assumed the risk; appellant does contend that two laws, the Logging Safety Code and the Employers’ Liability Act, must both be considered. Appellant does contend that the appellee’s decedent did violate the Logging Safety Code which has the effect of law, and that appellee cannot recover under the Oregon Employers’ Liability Act for a death which resulted from doing the said unlawful acts. The Act itself only sets up detailed precautions which are satisfied by the provision of a safe place to work. *Dickerson v. Eastern & Western Lumber Co.*, 79 Or. 281, 287, 155 Pac. 175.

Here the reason the decedent was killed was his failure to abide by the precautions required by another law, the Logging Safety Code. Nor is the case of *Suey v. Benson Hotel*, 91 Or. 935, 179 Pac. 239, in point here. The elevator operator there was not violating any state safety law at the time he was injured, nor was he operating his own elevator, as the decedent here was unloading his own truck. Here the decedent was responsible for compliance with the Logging Safety Code.

In Specification of Error VI appellant does not assume that decedent was an employee. O.C.L.A. § 102-1236, however, did require decedent's compliance with the Logging Safety Code. O.C.L.A. § 102-1236 applies to "every employer, employe and *other person*." (Emphasis supplied). Various cases involving employees are cited because by analogy they would be applicable to an independent contractor in view of O.C.L.A. § 102-1236.

It is noteworthy that appellee makes no answer whatever to Specification of Error VII through IX; and as to Specification of Error X, appellee makes no effort to meet authorities cited by appellant.

### **REPLY TO APPELLEE'S INDEPENDENT ARGUMENT**

Appellee has made its main argument without reference to the ten specifications of error set out in appellant's brief. Confusion of argument has resulted and the purpose of the court's rules requiring specification of errors in order to narrow controversy is largely defeated. To attempt to follow appellee's non-responsive argument in detail would only compound the confusion.

Appellant is content to rest on the arguments set out in its opening brief, but will here point out certain de-

ficiencies in the authorities cited by appellee. On page 7 of her brief, appellee relies on three cases for the assertion that the “and generally” clause extends to all persons having charge of or responsible for any work involving risk or danger to “persons having a lawful or contractual right to be on the property.” No one of the cases cited goes so far even by way of dicta, and in fact all three involve employees.

Indeed in one of the cases, the court makes the following statement:

“5. In the instant case, in order to warrant a recovery by reason of the provisions of the Employers’ Liability Act, it is necessary not only that it be shown that defendant was engaged in the kind of work embraced within the terms of that statute, that the plaintiff was defendant’s *employee* acting within the scope of his employment. \* \* \*” *Fitzgerald v. O. W. R. & N. Co.*, 141 Or. 1, 10, 16 P. 2d 27. (Emphasis supplied)

This supports appellant’s contention that the person injured under the Employer’s Liability Act must be an *employee* of some one.

After page 7 of appellee’s brief, practically every case cited has been discussed in appellant’s brief, and the general propositions which appellee attempts to deduce from them are contrary to the argument and authorities

set out in appellant's brief, especially at pages 6 through 19.

The case of *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 161 Pac. 411, is much relied on by appellee. It was omitted from the table of cases in appellant's brief but is cited at pages 12, 13, and 16. The Clayton case was an early case and its dicta on which appellee relies is inconsistent with the case of *Helzer v. Wax*, 127 Or. 427, 272 Pac. 556. The court in the Helzer case recognized this. Helzer, *supra*, 438; Appellant's Brief, 16.

*Turnidge v. Thompson*, 89 Or. 637, 175 Pac. 281, is referred to repeatedly by appellant in its brief (e. g. pp. 12, 13, 14, 16), and is here referred to because a quotation from that case set out at page 10 of appellee's brief has been cut down with a misleading effect. The entire quotation follows with the deleted portions inserted in italics:

"4. The title informs us that the bill provides for the protection and safety of persons 'engaged in' certain work and that the purpose is to extend the liability of employers to their employees; but the title does not contain the remotest intimation that the body of the bill makes the owner liable in damages to a member of the public who is neither 'engaged in' any kind of work mentioned in the title nor an employee of certain persons. *Measured by the rule announced in State v. Shaw*, 22 Or. 287 (29 Pac. 1028), *the title is not broad enough to confer such a right of action upon a member of the public as such.*



*It is true that the opinion in Clayton v. Enterprise Electric Co., 82 Or. 149 (161 Pac. 411), contains language more sweeping than was necessary; but that case is to be distinguished from the facts of the instant case, for there, although not an employee of the Enterprise Electric Company, Clayton was nevertheless an employee of Carl Roe, the owner of the motor pump for which the defendant was furnishing electricity, and was engaged in work on and about the electrical appliance that caused his death. Turnidge was neither a person engaged in work on or about the wire nor an employee of the owner of the wire. When measured by its title the Employers' Liability Act is broad enough, so far as it concerns an electric wire, to include both employees of the owner of the wire and also persons 'engaged in' certain work as exemplified in Clayton v. Enterprise Electric Co., supra, but it does not go further and give a right of action to every member of the public. Moreover, aside from any constitutional limitation, it is manifest, for the reasons already pointed out, that it was not the intent of the act to confer a right of action upon every person who might be injured.*

*"The conclusion which we have reached does not necessarily delete the words 'the public' found three times in Section 1 of the act. The words 'the public' retain their appropriate function in measuring the duty owing to those persons who are entitled to sue and also in determining the criminal liability of the persons enumerated in Section 3 of the act."* (pp. 653-4)

Appellee at page 13 of her brief quotes from the Turnidge case to the effect that the purpose of the

statute is to protect "working men." The court in its opinion relied on and printed the argument in favor of the Act as set out in the official voter's pamphlet which was sent to every registered voter in the state. Part of the quotation states:

" ' \* \* \* This bill does not ask so arbitrary and artificial a thing as that laborers' *wages* be protected and guaranteed by law, but it does ask that the *employer* be compelled to use diligence in protecting the laborer as to his life and limb, while earning *wages*; that a safe place in which to work be provided and that ropes, chains, beams, machinery, etc., be properly tested before the workman is asked to risk his life with them. \* \* \* ' " *Turnidge, supra*, 650. (Emphasis supplied.)

From the words italicized it is clear that the initiative bill's proponents had in mind the relationship of employer and employee and not that of contracting parties. This quotation provides the setting for the use of the word "workman" in the *Turnidge* case.

Appellant has attempted to answer ten distinct specifications of error by attempting to reduce them to a single question. That cannot be done here, since the law points involved are not, for the most part, dependant on each other. Appellee in the answer portion of her brief has not met the authorities and arguments made under each of appellant's ten specifications of error.

**CONCLUSION**

For the reasons stated in appellant's opening brief and in this brief, the court below erred in respect to each specification of error presented, and therefore this case should be reversed with direction for judgment for the appellant or for a new trial.

Respectfully submitted,

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NORMAN N. GRIFFITH.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

C. D. JOHNSON LUMBER CORPORATION,  
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KATHLEEN HUTCHENS, *Appellee.*

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KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee.*

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**REPLY BRIEF OF CROSS-APPELLANT AND  
APPELLEE KATHLEEN HUTCHENS**

---

Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

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Appeal from the District Court of the United States for  
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HON. GUS SOLOMON, *Judge.*

---

**I.**

Where a District Court had no power to order  
a remittitur, a conditional remittitur does not bar  
an appeal.

(The cross-appellant, hereinafter referred to as Mrs.  
Hutchens, here is answering the argument generally set

out under Point 1 in the brief of cross-appellee, hereinafter referred to as Johnson Corporation, on pages 4 through 9.)

The Johnson Corporation, in its argument, relies upon federal cases, most of which were prior to *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.C. 817, 82 L. Ed. 1118 (1939), and all but three of which were prior to *Guaranty Trust v. York*, 326 U.S. 99, 65 S.C. 1464, 89 L. Ed. 2079 (1945). In general the Johnson Corporation has not been responsive to the argument stated by Mrs. Hutchens. Mrs. Hutchens has argued in her original brief that the trial court below, on the basis of the reasoning of the *Guaranty Trust* case and Amended Article VII, Section 3, of the Oregon Constitution, had no power to order a remittitur.

In the cases cited by Johnson Corporation, the question of the power of the federal trial court is not at issue. Even in the case of *Rice v. Union Pacific Ry. Company*, 82 F. Supp. 1002, which case is most in point for Johnson Corporation's position, there was no indication that the State law was different from the federal practice; for this reason the issue found in the present case concerning whether the federal trial court had the power of ordering a remittitur was not before the Nebraska federal trial court in the *Rice* case. The two other cases cited by the Johnson Corporation which were subsequent to the *Guaranty Trust* case were: *Fornwalt v. Reading Company*, 79 F. Supp. 921 (E.D. Pa., 1948), which was an action under the Federal Employers' Liability Act, in which the federal trial court properly fol-

lowed the federal rules; *Mattox v. News Syndicate Company*, 176 F. 2d 897 (2d C.A. 1949), in which case there was no indication that the state rule on remittitur differed from the federal practice and the issue presently before this Court was not raised.

To state this general proposition in another manner, it is Mrs. Hutchens' position that all cases cited by the Johnson Corporation were distinguishable from the present case where Mrs. Hutchens filed a conditional remittitur, because here Mrs. Hutchens has raised objection to the power, as distinguished from the procedural right, of the federal trial court to direct a remittitur in the first instance.

## II.

**The trial court had no right to require the particular remittitur delivered in this case.**

(Mrs. Hutchens here is answering argument No. 2 set out in the Johnson Corporation's Brief, pages 10 through 16.)

Mrs. Hutchens feels that the analysis found on pages 9 through 22 of the original brief fully reply to the Johnson Corporation's contentions in this subdivision of its answer brief.

All of the cases cited in this section were decisions rendered prior to the *Guaranty Trust* case, with the exception of the three cases discussed and distinguished in the preceding section of this brief.

### III.

The right of the Federal District Court to require a remittitur as a condition for avoiding a new trial in a case arising under State law either exists or does not exist according to whether the exercise of such right would substantially change the outcome of the litigation had it been brought in the State court in which the right arose.

(Mrs. Hutchens here is answering the Johnson Corporation's argument (3) found on pages 17 through 33.)

Throughout the Johnson Corporation's argument in this section of its brief, the Johnson Corporation assumes its answer by assuming that the right to direct a remittitur is procedural and then it draws the admitted conclusion that procedural matters are determined by the law of the court of the forum. This argument presupposes its own conclusion. As Mrs. Hutchens pointed out in her opening brief, the U. S. Supreme Court has held that the matter is not one to be decided by the old conflict of laws concept of substance and procedure. (See argument (3) beginning on page 22 of Mrs. Hutchens' original brief.)

On pages 24 to 29 the Johnson Corporation has argued that the 7th Amendment to the Constitution is controlling in the present case. This again assumes the answer sought in the present controversy. The Johnson Corporation seems to argue on page 28 that the rule which the federal district court must follow in the State of Oregon cannot be the same as the Oregon rule because the Oregon rule concerning the right of the trial

court to review the findings of a jury stands as "a lonely eminence." It is contended by Mrs. Hutchens that this in no way meets the issue before this court.

On pages 29 to 31, the Johnson Corporation argues that the Oregon court's characterization of the relation between the judge and jury is not controlling upon the Federal courts in this case. Mrs. Hutchens cited *Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409, 177 P. 2d 429, as being a converse situation and purely informative to show in what manner other courts have chosen to divide the function of judge and jury. Mrs. Hutchens will agree that when a defense is based upon the Constitution of the United States, Federal decisions are binding; however, she reiterates that the *Guaranty Trust* case and subsequent decisions following that case support her position in the present controversy.

On pages 31 to 33, the Johnson Corporation argues that Mrs. Hutchens recovered on a common law right and relies upon *Hansen v. Hayes*, 175 Or. 358, 154 P. 2d 202. At page 398 of that decision, the Oregon court points out that the Employer's Liability Act creates a new cause of action and in its prior discussion that court held that there was no action after death at common law. It is Mrs. Hutchens' contention that any death act which is interpreted as creating a new cause of action is in derogation of the common law; and that, therefore, Mrs. Hutchens' present cause of action exists purely because it is an Oregon statutory creation.

The cases cited in this section of the Johnson Corporation's answer brief, with the exception of the Oregon

cases cited for the substantive of law contained therein, may be briefly analyzed as follows:

Again most of the cases cited are prior to the *Guaranty Trust* case; of the remaining cases, the three cases distinguished in Section 1 of this brief have been recited in this section. In *United States v. Fotopulos*, 180 F. 2d 631 (9th CA, 1950), the action was brought under the United States Federal Tort Claims Act and State law was used to measure negligence, but Federal procedure was properly used by the Federal court since by Congressional Act it was the only forum available for the trial. It may be noted that there was no jury involved in this case. In *Windor v. Daumit*, 179 F. 2d 475 (7th CA, 1950), which was cited on page 18 of the Johnson Corporation's brief, the court was discussing the effect of the Federal Rules in cases where they conflict with prior statutes of Congress. In *California Fruit Exchange v. Henry*, 89 F. Supp. 580 (WD Pa., 1950), there was no indication that the State rule and the Federal practice concerning the right to direct a remittitur differed and therefore the issue before the present court was not raised. In *Raske v. Raske*, 92 F. Supp. 348 (Minn. 1950), the same objection exists as is found in the preceding case. In *Logan v. Holman*, 7 F.R.D. 596 (N.J. 1947), the matter before the court was whether the question of fraud should be tried by the jury or by the court; in its discussion the court relied upon the old procedural-substantive distinctions and failed to recognize the holding of the Supreme Court in the *Guaranty Trust* case.

The two remaining cases cited on page 32 of the Johnson Corporation's brief were cases already discussed in Mrs. Hutchens' original appeal brief.

In looking to *Cyclopedia of Federal Procedure* for aid, we find that the holding of the *Erie R. R. Company* case, was that the decisions of the State courts should control in matters involving substantive law. The evil which the *Erie* case sought to avoid is the alteration of substantive rights by choice of forum and that evil cannot be present where the rule involved concerns a policy of administration rather than a right of litigants.

Congress is without power to declare what rules of substantive law shall govern the federal courts in diversity cases and neither Congress nor the Supreme Court has power to declare a state rule of substantive right to be other than the courts of the state have established, nor can they undermine such a substantive rule or destroy it by procedural requirements. Quoting *Francis v. Humphrey*, 25 F. Supp. 1.

While the line between procedure and substantive law is said to be foggy, it has been suggested that the federal court should consider the state court's classification of the matter, at least to the extent that it should not hold a matter procedural if the state courts do not.

Past authorities dealing with the dividing line between substantive and procedure, are relatively of small value in the present connection because they were expressions of the needs of the particular situations not analogous to the present in which may be found the

clue to the point of view that should be taken. *Sampson v. Channell*, 110 Fed. 2d 754, 128 A.L.R. 394, suggests,

“Hence the greater likelihood there is, that litigation would come out one way in the federal court, and another way in the state court, if the federal court failed to apply a particular local rule, the stronger the urge would be to classify the rule as not a mere matter of procedure but one of substantive law falling within the mandate of the *Tompkins* case.”

A suggested test that has met much favor, called the “Uniformity of Result Test” is, that matters potentially capable of bringing about a result in a federal court different from that in the state court, should be classified as substantive, with its corollary that matters not calculated to affect the result but which relate primarily to the mechanics of formation of the issues should be held procedural.

Federal courts are not free to follow their own views in questions involving a conflict of laws but must defer to the state law of conflict of laws in its entirety. In *Klaxton Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, Justice Reed said, in a case tried in Delaware, involving the question of whether New York law making the addition of interest on judgments mandatory or the law of Delaware was to be applied, said:

“We are of the opinion that the prohibitions declared in the *Erie R. R. Company v. Tompkins* against such independent determination by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those pre-



vailing in Delaware state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of conformity within a state upon which the *Tompkins* decision is based."

We further find in Goodrich, *The Conflict of Laws*, 2d Ed., page 24:

"Thus (as a result of the *Tompkins* case) today the federal courts have no independent rules of common law and, therefore, conflict of laws, but must follow the rules established in the state courts of their districts. The final result is proper and desirable. It prevents a difference in the decision depending upon whether suit is brought in the state or federal courts and more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished." (See 128 A.L.R. 404.)

In the field of evidence, the court, in *Howard v. U. S.*, 185 Fed. 2d 986, held that state law presumptions were so bound together with local property rights that failure to apply them would result in serious interference with local substantive law.

And speaking of the right of trial by jury, in *Ross v. Service Lines, Inc.*, 31 Fed. Supp. 871, involving the issue of a fraudulent release, the court said:

"I take it that since *Erie v. Tompkins* the remedies of the parties in Illinois should be determined as the law of that state directs, unless in violation of some federal statute. The existence or non-existence of a certain remedy and the determination of its character as between law and equity involve more than mere procedural questions."

Even in the case of new trial, which is usually considered a matter of procedure, nevertheless the situation can arise in which refusal by the federal courts to recognize grounds for new trial which state courts would hold determining can be viewed as an infringement upon substantive rights. *Equator Mining and Smelting Co. v. Hall*, 106 U.S. 86.

Throughout the entire field, the principle runs, as expressed in the *Guaranty Trust* case, the intent of the *Erie* case was to insure that in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation should be the same, so far as the legal rules determining the outcome of the litigation, as it would if tried in a state court. In the state of Oregon a court is not permitted to reduce a verdict solely because the court viewed the jury's verdict as excessive.

Reduced to its simplest terms, Mrs. Hutchens' contention is that in the State of Oregon the state courts are without power to reduce a jury's verdict solely upon the ground that the court thought it excessive. Therefore, a federal court sitting in Oregon, trying a case arising in Oregon, involving a resident of Oregon, under an Oregon statute, is likewise without power to reduce the jury's verdict.

## SUMMARY

It is Mrs. Hutchens' contention that the United States Supreme Court has directed that the result in diversity cases should be substantially the same as the result would have been had the case been tried in a state court. It is her position that in the present case there could have been no remittitur directed had the case been tried in the courts of the State of Oregon. For this reason the Federal trial court below had no power to direct a remittitur. The fact that Mrs. Hutchens filed a conditional remittitur in order to appeal this lack of power of the court below distinguishes her situation from the remittitur cases cited by the Johnson Corporation. Mrs. Hutchens feels that the procedural manner in which she acted was her only available remedy under the circumstances to protect her rights as declared by the United States Supreme Court in the *Guaranty Trust* case where the court said,

"The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal instead of in a State court a block away should not lead to a substantially different result."

## CONCLUSION

For the reasons stated in Mrs. Hutchens' opening brief and in this brief, it is submitted that the court below erred in respect to each specification of error presented and that therefore the judgment of the court below should be reversed and a judgment should be entered by this court consonant with the verdict returned by the jury in the court below.

Respectfully submitted,

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HARRY GEORGE, JR.,

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Attorneys for Cross-Appellant  
Kathleen Hutchens.

No, 12914

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

---

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee.*

---

**PETITION FOR REVIEW**  
**BY APPELLEE HUTCHENS**

---

Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

---

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FILED

MAR 5 1952

PAUL P. O'BRIEN  
CLERK



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**United States**  
**COURT OF APPEALS**  
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KATHLEEN HUTCHENS, *Appellant,*

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C. D. JOHNSON LUMBER CORPORATION,  
a Corporation, *Appellee.*

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**PETITION FOR REVIEW**  
**BY APPELLEE HUTCHENS**

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Appeal from the District Court of the United States for  
the District of Oregon.

HON. GUS SOLOMON, *Judge.*

---

**I. MOTION FOR RECONSIDERATION**

Comes now the Appellee Hutchens and moves the Court to reconsider its opinion and decision dated December 5, 1951, and to make a new determination in the matter for the reason that the Court has found that

to come within the scope of the Employers Liability Act of the State of Oregon it is necessary "that Hutchens at the time of his accident be an employee of someone engaged in the enterprise out of which the injury arose." Appellee contends this statement is erroneous. The point involved is of such magnitude and far-reaching importance and the Court's opinion indicates that there was such inadequate presentation of the matter on this point that it was not possible for the Court to be fully advised and, therefore, the duty of Appellee to request this review.

## II. PERTINENT FACTS

A short review of the factual situation shows that the C. D. Johnson Lumber Company operated a log dump in connection with their sawmill and lumber business. That logs purchased by the company, together with their own logs, were received by the company at this log dump. That the unloading process was performed on the property of the company, and involved the use of heavy machinery owned and operated by the company by the company's specially skilled employees. The facts further show that the Logging Safety Code of the State of Oregon by law placed the responsibility of the safe operation of the log unloading machinery on the operator of the machinery. That the company by posted rules and business practices, made it a condition precedent to whomsoever delivered logs to this dump to subject themselves to the condition that the company would have the complete direction and control of the unloading work. That as a practical matter this was the most efficient and

safest manner to unload the logs. The facts further show that 20 different truck drivers unloaded approximately 80 different loads of logs daily at this unloading dump. Some were the company's employees, some were independent contractors' employees, and some were individuals unloading their own logs. All were treated the same and subjected to the same rules. The fact that under the Court's pronouncement Francis, if driving his own truck, would not be covered by the Act, but, if he allowed his employees to drive the truck, the employees would be protected, demonstrates a result that it is suggested a re-examination will resolve a less inequitable result.

At the outset appellee agrees with the opinion of the Court as to bearing the Guaranty Trust Company of New York vs. Grace W. York 326 U.S. 99, but point out that there is no Oregon Court decision that is squarely in point on all fours. This leaves the Court free to determine this question unfettered by State decisions. The fact that perhaps more than 90 per cent of all workmen are employees and, therefore, their court cases involve only those who happen to be employers should not confuse the issues. An exhaustive search of the cases shows many cases where the protection of the Act was denied the Plaintiff, but not a single instance appears where the coverage of the Act was withheld because the Plaintiff was not under a master and servant contract at the time his action arose.

The Court has apparently failed to consider the 1st part of Sec. 102-1601 covering the operation of machinery and the requirement of a system of communication be-

tween the operator of the machinery and the person doing the work, attention of which is called. *Shulte vs. Pacific Paper Company* 67 Ore. 334 hold that it is not necessary to allege that action was under this statute to justify its application where the complaint stated facts to which the rule of law embodied by the statute was applicable. Also see *Dickerson vs. Eastern & Western Lumber Company* 79 Ore. 281.

### III. ARGUMENT

#### 1. The Vice to Be Corrected by Act

The vice to be corrected was to stop the terrible maiming and killing of workmen because of unsafe working conditions over which they had no personal control. To accomplish this the "person in charge or control of the work" was required to "use every device, care and precaution" if the work was hazardous and if the work was construction, operation of machinery, or involved the use of electricity or dangerous appliances, detailed duties were imposed as enumerated in detail in the Act. The person to be protected was the workman who did not have the direction and control of the work or was not the owner, contractor, or person having charge of the work, but who was compelled to perform his work under conditions that he himself did not possess the power to control. He was while working not the master of his own destiny. Whenever he was the person in direction and control of the work, he was the one charged by the Act with the duty whether he was owner, contractor, foreman, independent contractor, or agent. If only workmen under a contract





of master and servant were to be protected, the Act could have made only "employers" responsible instead of owners, contractors, sub-contractors, coporations and persons whatsoever. No master and servant contract by the workmen is indicated. But the Act was passed to protect those workmen required to do their work under working conditions that they themselves are without power to control. The only rational explanation of the cases placing the protection of the Act on other persons' employees and not limiting the protection to the master and his own servants is that it covers workmen who have to subject themselves to hazards controlled by others than himself. Independent contracts are alone responsible because they are the ones having the control of the hazard.

### 3. Analysis of Act

The chart analysis shown heretofore is prepared to aid the Court in the requested review.

#### (a) CLASS CHARGED WITH THE DUTY BY THE ACT

An analysis of Section 102-1601 shows that there are 5 classes of persons who are charged with the duty, provided they are engaged in performing certain designated activities. These persons are "owners," "contractors," "sub-contractors," "corporations" and "other persons," or "persons whatsoever." Appellant company is both "owner," "corporation" and "other person" or "persons whatsoever," which is admitted by all parties concerned.

These persons are charged with a duty only if engaged in one or more of the following activities:

- (1) Constructing, repairing, altering, removing or painting bridges, viaducts or other structures;
- (2) Erecting or operating machinery.
- (3) Manufacturing or transmitting electricity.
- (4) Manufacturing dangerous appliances or substances.
- (5) Having charge of and responsible for work involving risk or danger to the employees or the public.

The appellant company is admitted to be one "operating machinery" and the uncontradicted evidence shows it to be one "having charge of and responsible for work involving a risk or danger" to the employees and the public. Therefore, the appellant company is one of the class that the Act places a duty upon.

#### (b) DUTY IMPOSED BY THE ACT

Without reviewing parts of the Act not involved in this case, it appears that "owners," "corporations" and "persons whatsoever" who are "operating machinery" or "doing work involving risk and danger to the employees" or both are charged with the duty as shown by the chart to do 15 different things, among which are the duties:

(1) To see that all dangerous machines are securely covered and protected to the fullest extent that the proper operation of the machinery will permit;

(2) That all machinery other than that operated by hand-power is, whenever necessary for the safety of the persons employed in or about the same for the safety of the *general public*, be provided with a system of com-



munication by means of signals, so that at all times there may be prompt and efficient communication between the employees or *other persons* and the operator of the motive power;

(3) To use every device, care and precaution practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other appliances or devices, and without regard to the additional cost of suitable materials or safety devices. Stated shortly, the duties charged upon this appellat company is to have a proper system of communication between the person working and the operator of the motive power and to use every device, care and precaution. Both duties are duties that are greater than that imposed by common law.

### (c) PERSONS TO WHOM DUTY IS OWED

If the Act is analyzed sentence by sentence to determine to whom is owed the duty by the "owner," "corporation" or "persons, whatsoever" or "other persons" while operating machinery unloading logs to have a "proper system of communication between the person and the operator of the motive power" and to "use every device, care and precaution," he find as follows:

The first mentioned in the context of the body of the section is an inference in connection with the use of metal, rope, glass, rubber, gutta percha, or other materials. No one is specified, so that it is a reasonable and fair inference that it would be the workmen who were required, in the course of their work, to use it. These workmen

could, conceivably, not be employees but the work generally has to be under the direction and control of the person so charged.

The next mentioned in the context of the body of this section in connection with scaffolding, where overcrowding is prohibited. No person is specified here either, but a reasonable and fair inference is that it is the "workers" who are required to use it.

The next reference is found in connection with the mandate for safety rails or scaffolds, to-wit: "To prevent any person" from falling. "Employee" is not named as such. "Person" again means "workman."

The next reference is a mandate as to the use of proper guards to protect from dangerous machines, to-wit: "that the proper operation of the machine permits." "Operation" implies "operator" who by this mandate, is the one who is supposed to be protected.

The next reference appears in the mandate as to the requirement that a communication system is necessary in operating machines "for persons employed in or about the same," that is, the persons doing work on or about the machine. No contract of master and servant is a condition precedent to the protection of the person working about that machine if engaged in the work that the owner is doing.

In the same connection of the duty of the signal system, it is extended to provide "for the safety of the general public". There is still no inference that the duty owed is only to persons under a master and servant con-

tract but concededly limited to workmen and members of the public engaged in a mutual undertaking with the party charged with the duty.

Following this we find that the communication system must be between the employees or *other persons* and the operator of the motive power. "Other persons" following "employees" must connote that "other persons" is different and not the same as "employees". In the instant case the "other person" was Dean Hutchens. The Act clearly does not require Hutchens to be proved to be under a contract of master and servant relationship as a condition precedent to being owed the duty declared by the Act of having a communications system between the operator and the motive power and himself. This is the first time that the word "employee" appears in the Act and the significance of the words "other persons" cannot be construed as the same or they would not follow so closely or used to distinguish someone other than "employee".

The next reference as to whom a duty is owed is in connection with the proper insulation of electric wires "where the public or employees of the owner \* \* \*" transmitting or using the electricity might come in contact with it. Here again the bounds of statutory construction are not strained to conclude that "the public" "using electricity" is different from "employee" "using electricity". If the person's job, occupation, or work requires that he work so near or with the electricity-bearing wires that he may come in contact with them, he is owed the duty as to proper insulation by the transmitter of the elec-

tricity. It is the joint use that is engaged in that creates the duty of one to the other which the mandate of the Act covers.

Likewise, the mandate that dead wires shall not be mingled with live wires, infers that it applies to the protection of all persons or workmen whose job requires them to work with said wires in some mutual enterprise with the transmitter of the electricity.

The same applies as to the mandate that arms or supports bearing live wires shall be especially covered.

Likewise the mandate that "dangerous voltage wires" shall be strung at "such distance on poles or supports as to permit *repairmen* to freely engage in their work without danger of shock". "Repairmen" could conceivably be someone other than employee, yet the Act says he is protected. In certain areas, high voltage-carrying wire is strung on the same poles as are used by telephone and other uses. The mandate of the Act is to protect and make safe the "workers" other than the employees of the transmitter of the electricity in their work on the poles mutually used by the electric company and the others.

The final reference as to duty directs that the person having charge of and repsonsible for work involving a risk or danger "to the employees" "or the public" shall do certain things. The word "public" must mean something other and different from "employees" or it would not follow so closely. "Public", it is suggested, refers to those persons, not employees, who are workmen mutually engaged with the person having charge of and responsible for the work involving risk or danger. To pro-

tect him the Act places a duty upon the person in charge of and responsible for the work and requires that he use certain cares and precautions. The worker. The worker not being charged is at the mercy of the one in charge. The word "public" therefore, must mean those workmen who are engaged in a mutual undertaking with the person in charge. If the workman himself is in charge, then he can control and be responsible to see that the Act is abided by, but otherwise he must rely entirely for his safety and protection from the one in charge. There is no indication here that the workman has to be under a contract of master and servant to someone who may be miles away as a condition precedent to protection and otherwise the person in charge is excused from using every device, care and precaution which the Act makes mandatory.

In summary, the analysis shows that the persons to whom the one in charge of and responsible for work, or is operating the machinery, owes a duty to the "workers", implied, "persons", "operator" inferred, "persons employed in or about" that is, persons working in or about, "the general public", "other persons", "public", or "employees", "workmen" inferred, "repairmen", "employees", "the public", provided they are engaged with the person in charge in a mutual enterprise as designated by the Act. The word "employee" appears three times to distinguish other than "employees". "Public" appears three times, to distinguish someone other than "employee". "Worker" and "repairmen" and "operators" all are different from "employees". It is manifest that the person doing the designated work or in charge of and responsible for work involving a risk or danger, is not excused from the duty

imposed on him by the Act if the injured party who is mutually engaged with him in performing the work is not under a contract of master and servant with someone.

To continue the search through the Act, *Section 102-1602* makes the person in charge and control of the work responsible, whether he happens to be a owner, a manager, a superintendent, or a foreman. This buttresses the contention that the intention of the Act is to insure the closest protection possible from the one in charge to the "worker" who to do his work, is exposed to the danger, thus showing the Act is not limited to those workers having only master and servant contracts.

*Section 102-1603* places a penalty by fine of \$10 to \$1,000 or imprisonment of 10 days to one year, all persons in charge of the designated work who fail to see the requirements of the Act are complied with. This criminal statute was enacted for the protection of the workers exposed to the danger. The evidence and verdict of the jury shows that the company was the person in charge and violated the Act. Yet the holding of the Court will wash the hands of the person in charge and take from all workmen not under a master and servant contract at the time of injury, the protection of the Act. To require a log truck operator to hire a driver rather than to operate his trucks himself to be entitled to the protection of the Act is inequitable.

*Section 102-1604*, Who May Prosecute under the Act, is conspicuous by containing nothing to indicate that the deceased must have been an employee before his widow or heirs could recover in an action for a negligent death caused by the person in charge.

*Section 102-1605* merely sets forth that if the injured party happens to be an employee, the usual "fellow servant" defense is withdrawn from the defendant.

*Section 102-1606* sets forth that contributory negligence of the injured party is not a defense to the person in charge but may be considered in mitigation of the amount of damages.

Viewing the Act and how it came into being, it must be remembered that the referendum was prepared by the American Federation of Labor, a body of workmen, not lawyers. That the loose and layman use of the word "employee" is, to have it synonymous with "workmen" and without reference to the existence of a master and servant contract. The Legislation, being remedial for the protection of the workmen and laboring men and women, should be liberally construed to effectuate its purpose. The Factory Acts, the various Safety Codes, and this Act, is to regulate the conduct of the person in charge of and responsible for the work to see that workmen who may have no control or means to make safe the work are protected. Workmen should not be discriminated against by requiring that a master and servant contract must be proved before the person in charge of and responsible for the work owes him a duty to protect his safebeing.

**IV. A PERSON WHO, BY LAW, IS CHARGED WITH AN ABSOLUTE DUTY TO ANOTHER PERSON OR THE PUBLIC CANNOT BY DELEGATING PERFORMANCE OF THAT DUTY TO AN INDEPENDENT CONTRACTOR, RELIEVE HIMSELF FROM LIABILITY FOR NON-PERFORMANCE OR NEGLIGENT PERFORMANCE THEREOF.**

The foregoing rule is a general rule recognized by all and is found at 57 CJS, Page 365, under Master and Servant, Article 591.

It is clear from an analysis of the Act that the company is the operator of machinery and by conducting work involving risk and danger is subject to the Act. The law places the duty upon his shoulders by virtue of the work he is doing, and, therefore, he cannot by employing an independent contractor relieve himself from the responsibilities of this Act, which is an Act passed for the safety and protection of the public. This is not to be construed as an admission that Hutchins was an independent contractor which is most strenuously contend that he was not, but rather to indicate were he found to be an independent contractor, it would still not relieve the company of the duty laid down by the Act.



**V. WHERE THE EMPLOYER INTERFERES WITH THE PERFORMANCE OF THE WORK AND ASSUMES CONTROL OR DIRECTION OF THE METHOD OF PERFORMING IT, THE ORIGINAL RELATION OF EMPLOYER AND INDEPENDENT CONTRACTOR IS CHANGED TO THAT OF MASTER AND SERVANT AND THE EMPLOYER BECOMES LIABLE FOR INJURIES RESULTING FROM WRONGFUL OR NEGLIGENT ACT DONE IN PERFORMANCE OF HIS ORDERS OR DIRECTION.**

The Court's attention is called to the above-entitled rule which is found at 57 CJS, Page 369, Article 593.

There was no question in this case but what the appellant company retained complete direction and control of the work while it was being performed. Thus, even if Hutchins were found to be an independent contractor, which appellee contends he should not be, it still would not relieve the company of the duty imposed upon it by the statute.

This is further demonstrated by citation at 57 CJS, 379, Art. 607, to the effect that "Ordinarily the contractee is not liable for injuries sustained by the contractor in the performance of a contract, but if the employer retains the right of control a different rule applies. \* \* \* A contractee is liable for an injury occasioned by his own negligence or by the wrongful act of his building engineer in the course of the latter's employment."

The company by rule and in obedience to the State Safety Law, made it a condition precedent to working on their log dump that the company had and exercised complete direction and control of the unloading of the logs by their own servants. The company should not be excused from the duties imposed by the Act for the protection of working men just because the injured workman is not proved to be under a master and servant contract, and should not hold that he can get the protection of the Act only when there is a master and servant relationship.

Further analysis of Oregon decisions will not be repeated here, but if the citations in appellee's brief heretofore filed are reviewed, it will be found that there is repeated reference in regard to those to whom the Act protected, to such persons as persons working around high voltage wires, persons engaged in certain work, other persons, workers in hazardous employment, repairmen, and the public, all words that are used to differentiate the workman from that of an employee.

And therefore, it seems amply evident that the Oregon Court has never at any time attempted to lay down such a rule as would state that only those under a master and servant contract were protected by the Act, as this would eliminate a vast army of workmen that the Act was passed to protect.

## SUMMARY

There is no case on all fours with the instant case so that the Court is not bound by any State Court decision on this particular point. Many plaintiffs in the past have been denied the protection of the Act, but not one has been denied this protection because he was not under a master and servant contract when injured. The Court apparently has failed to consider the fact that the 1st part of Section 102-1601 creates a duty on the company as owner and operator of machinery in addition to the duty placed on them by virtue of the fact that they were engaged in work involving risk and danger. The Act was passed to protect workmen exposed to operating machinery owned and operated by another and to protect them when the work exposed them to risk and danger in hazardous industries where the workman was not in control or in charge of the work himself, but had to submit to the danger created by others. The company here was a member of the class charged with the duty of the Act by being an owner and a corporation and a person whatsoever that was operating machinery and responsible for work involving a risk and danger.

The duty of the company was to see that the machinery was properly guarded and that there was an adequate communication system between the persons working and the operator of the machinery. There is the further duty to protect life and limb of the workmen.

The persons to whom the duty was owed are shown to be persons, persons employed in or about, the general

public, employees, repairmen, operators, and workmen inferred.

The employer cannot excuse himself of a duty imposed by law by delegating his work to an independent contractor, and, further, if he were to have let his work to an independent contractor yet retains control and direction of the performance of the work, the status of the independent contractor is changed to that of master and servant in the eyes of the law.

For the foregoing reasons, it is submitted that the Act should not be limited to only those who at the time of the injury were under a contract of master and servant.

Respectfully submitted,

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EMERSON U. SIMS,

Attorneys for Appellee.

No. 12915

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United States  
Court of Appeals  
for the Ninth Circuit.

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J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, Under the Longshore-  
men's & Harbor Workers' Compensation Act,

Appellant,

vs.

COASTAL NAVIGATION COMPANY, a Corpo-  
ration; FIREMAN'S FUND INSURANCE  
COMPANY, a Corporation; and MRS. GEN-  
EVIEVE LONG,

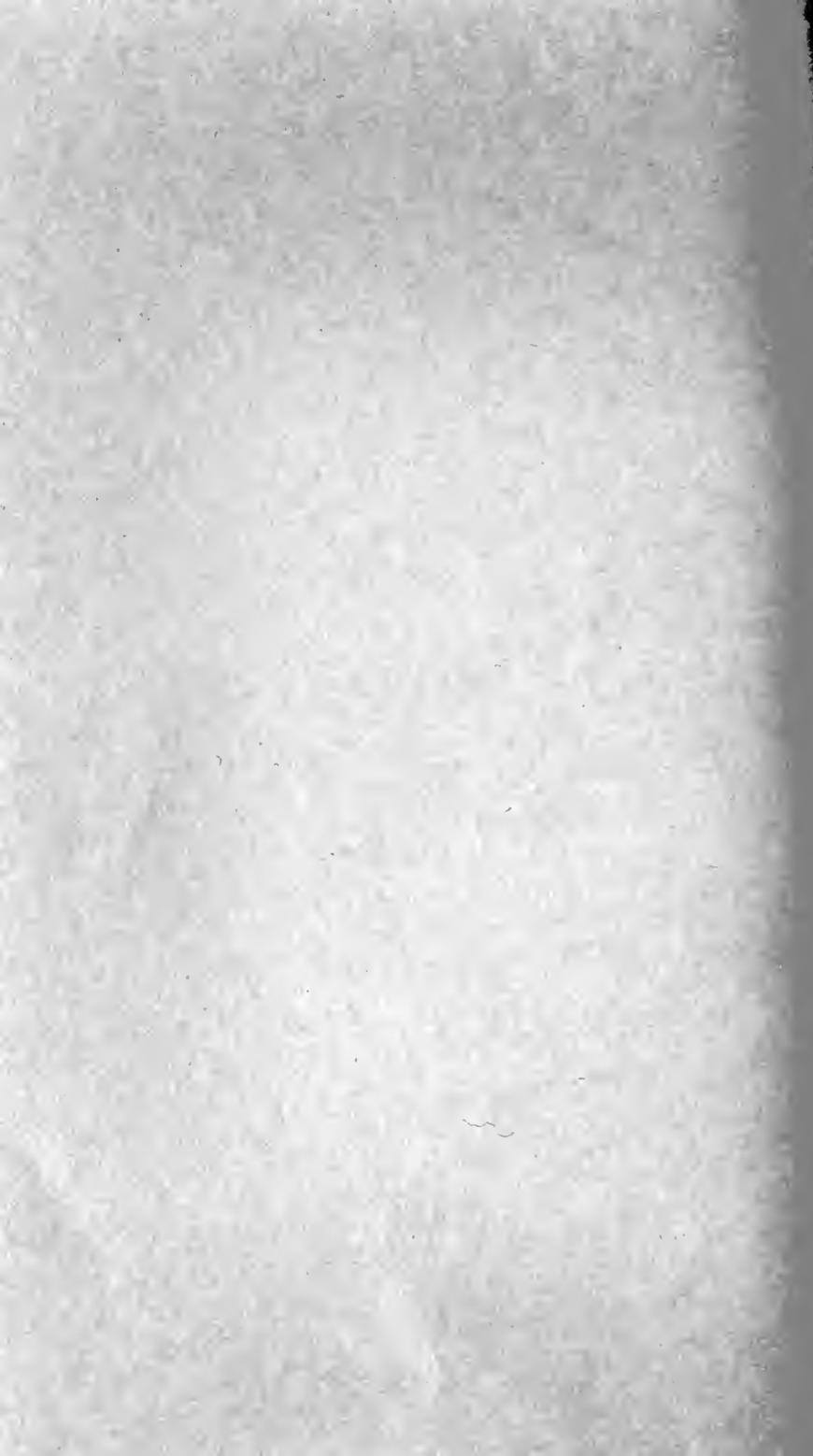
Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.



No. 12915

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United States  
Court of Appeals  
for the Ninth Circuit.

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J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, Under the Longshore-  
men's & Harbor Workers' Compensation Act,  
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vs.

COASTAL NAVIGATION COMPANY, a Corpo-  
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Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS, and

JOHN E. BELCHER,

Attorneys for Appellant,

1017 U. S. Court House,  
Seattle 4, Washington.

BOGLE, BOGLE & GATES, and

EDWARD S. FRANKLIN,

Attorneys for Appellee,

603 Central Building,  
Seattle 4, Washington.

BASSETT & GEISNESS, and

J. DUANE VANCE,

Attorney for Intervenor Mrs. Genevieve  
Long,

811 New World Life Building,  
Seattle 4, Washington.



In the United States District Court for the Western  
District of Washington, Northern Division

No. 2585

COASTAL NAVIGATION COMPANY, a Corpo-  
ration and FIREMAN'S FUND INSUR-  
ANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner Fourteenth  
Compensation District Under the Longshore-  
men's and Harbor Workers' Compensation  
Act,

Defendant.

### PETITION FOR INJUNCTION

Come now the plaintiffs, and for cause of action  
against the defendant allege:

#### I.

That plaintiff Coastal Navigation Company dur-  
ing all times material to this petition, was a corpo-  
ration organized under the laws of the Territory of  
Alaska and engaged in the business of operating  
steamships.

#### II.

That plaintiff, Fireman's Fund Insurance Com-  
pany, is now and at all times hereinafter mentioned,  
was an insurance company organized as a corpora-  
tion under and by virtue of the laws of the State of  
California, and was the insurance carrier secured by

the plaintiff Coastal Navigation Co. in accordance with the terms and provisions of the Longshoremen and Harbor Workers' Compensation Act. (33 U.S.C.A. § 901 et seq.)

### III.

That defendant J. J. O'Leary is the duly acting and appointed Deputy Commissioner of the United States Employees Compensation Commission for the Fourteenth Compensation District, administering the Longshoremen and Harbor Workers' Compensation Act.

### IV.

That on May 7, 1942, one Frank Long, Chief Engineer and a member of the crew of the SS "Coastal Glacier," owned and operated by plaintiff Coastal Navigation Company, died at the Seattle Marine Hospital; that thereafter on December 2, 1949, Mrs. Genevieve Long, surviving widow of decedent Frank Long filed a claim for compensation under the Longshoremen and Harbor Workers' Compensation Act, alleging the death of her husband was due to an injury sustained by him while in the employ of Coastal Navigation Company at Houghton, Washington, May 2, 1948.

### V.

That plaintiffs controverted said claim, denying decedent met with any injury in the course of his employment resulting in his death or that he was subject to the provisions of the Longshoremen and Harbor Workers' Act for the reason that the de-



cedent Long was a member of the crew of the SS "Coastal Glacier" at the time of the alleged accident, and crew members are exempted from the coverage of the Longshoremen and Harbor Workers' Act by (33 U.S.C.A., §3) of said Act.

## VI.

That a hearing was had on the claim of the widow before defendant J. J. O'Leary as Deputy Commissioner, and on June 16, 1950, the said defendant erroneously and illegally filed an order determining that the said decedent was subject to the provisions of the Longshoremen and Harbor Workers' Act and had sustained a compensable injury on May 2, 1942, while in the employ of plaintiff Coastal Navigation Company, and awarded her death benefits under said act.

## VII.

That plaintiffs are presently paying compensation to the widow of the deceased as required by said order.

## VIII.

That the said compensation order and award by defendant J. J. O'Leary, filed on June 16, 1950, not being in accordance with law should be suspended and set aside and held for naught.

## IX.

That less than thirty (30) days have elapsed since the entry and filing of said compensation order and award of compensation, and the plaintiffs have no relief or adequate remedy at law.

Wherefore, plaintiffs pray for judgment as follows:

(1) That a decree be entered herein adjudging said compensation order and award of June 16, 1950, (attached hereto and made a part hereof as Exhibit "A") to be unlawful and contrary to the provisions of the applicable law, and ordering and directing that the enforcement of said award be permanently enjoined, suspended, and set aside, and that the said defendant Commissioner be required to vacate said order, and file a new compensation order rejecting the claim filed by the claimant Genevieve Long for the reason that her deceased husband at the time of his alleged injury was not subject to the provision of the Longshoremen and Harbor Workers' Compensation Act, or in the alternative, that the said decedent did not die as a result of an injury sustained in the course of his employment.

(2) For such other, further or different relief as to the court may seem equitable and just.

BOGLE, BOGLE & GATES.

State of Washington,  
County of King—ss.

Edw. S. Franklin, being first duly sworn on oath deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that he is authorized to and does make this verification on behalf of the plaintiff; that he has read the foregoing petition for

injunction, knows the contents thereof, and believes the same to be true.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 28th day of June, 1950.

[Seal] /s/ MAX KAMINOFF,  
Notary Public in and for the State of Washington,  
residing at Seattle.

EXHIBIT "A"

U. S. Department of Labor  
Bureau of Employees' Compensation  
Fourteenth Compensation District

Case No. 1091-1

In the Matter of:

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

GENEVIEVE LONG,

Claimant,

FRANCIS L. LONG (Deceased),

vs.

COASTAL NAVIGATION COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,  
Insurance Carrier.

COMPENSATION ORDER AWARD OF  
DEATH BENEFITS

Such investigation in respect to the above-entitled claim having been made as is considered necessary

and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

### Findings of Fact

That on the 2nd day of May, 1948, the deceased above named was in the employ of the employer above named at Seattle, in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by Fireman's Fund Insurance Company; that the deceased entered the employ of the employer during the latter part of 1946 as Chief Engineer aboard the vessel "Coastal Glacier" at Ketchikan, Alaska; that in March, 1947, after having made one voyage in Alaskan waters the said vessel was brought to Seattle, Washington, and tied up at Ballinger Dock on Lake Washington; that except for the deceased, the crew of the vessel was then discharged, but deceased remained with the vessel in the capacity of caretaker and acted as Chief Engineer whenever the vessel was on a voyage under charter; that his duties consisted of keeping the engines in running order, charging the batteries, general care and maintenance of the vessel and to keep trespassers from boarding the vessel; that during the time the vessel was tied up at Ballinger Dock it was kept in readiness to sail on one day's notice and was on several occasions engaged under charter for fishing trips and for other purposes; that the last trip made by the vessel prior to May 2, 1948, was during September, 1947, and that sub-

sequent to that time the vessel remained tied up at Ballinger Dock; that the deceased lived aboard the vessel, prepared his own meals and was furnished subsistence by the employer; that on May 2, 1948, while the deceased was decending the stairway leading to the engine room he slipped and fell, in consequence of which he suffered a right strangulated hernia; that the deceased was admitted to the U. S. Marine Hospital on May 4, 1948, and died in said hospital on May 7, 1948, following an operation for the repair of the strangulated hernia; that written notice of death was not given within thirty days but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice; that a claim for death benefits was filed in the office of the Deputy Commissioner on December 12, 1949, which was more than one year after the death of the deceased and objection to such failure was made at the first hearing of the claim in which all parties in interest were given reasonable notice and opportunity to be heard; that the employer failed to file a report of injury and death of the deceased in accordance with the provisions of Section 30 (a) of the Longshoremen's and Harbor the time limitation for the filing of a claim for death benefits did not run against said claim and that the claim for death benefits was timely filed; that at the time of his injury the deceased was performing service for the employer in his capacity as a caretaker of the vessel "Coastal Glacier" and not as a member of the crew of said vessel; that the in-Workers' Compensation Act and in accordance with the provisions of Subdivision (f) of said Section

jury and death of the deceased arose out of and in the course of his employment by the employer above named; that the average annual earnings of the deceased at the time of his injury amounted to \$3000.00; that Genevieve Long, who was born on May 16, 1895, and married to the deceased on April 26, 1915, is the surviving wife of the deceased and as such is entitled to death benefits for her support at the rate of \$13.13 per week; that the accrued death benefits from May 7, 1948, to June 15, 1950, inclusive, amount to \$1444.30; that funeral expenses in the amount of \$725.88 were paid by the claimant, Genevieve Long, and she is entitled to reimbursement for funeral expenses in the amount of \$200.00.

Upon the foregoing facts the Deputy Commissioner makes the following

#### Award

That the employer, Coastal Navigation Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to Genevieve Long as surviving wife of the deceased, death benefits as follows: 110 weeks at \$13.13 per week from May 7, 1948, to June 15, 1950, inclusive, in the amount of \$1444.30, which the employer and insurance carrier are directed to pay forthwith in one sum (Less Attorneys' fee hereinafter provided for) and shall continue payments thereof in bi-weekly installments at the rate of \$13.13 per week subject to the limitations of the Act or until otherwise ordered. The employer and carrier shall also pay to Genevieve Long the sum of \$200.00 as funeral expenses of the deceased employee.

A fee in the amount of \$100.00 is hereby approved in favor of Attorneys Bassett & Geisness, New World Life Building, 2nd and Cherry, Seattle 4, Washington, for services rendered the claimant in connection with the presentation of her claim, the same to be a lien on and deducted from payment of this award.

Given under my hand at Seattle, Washington, this 16th day of June, 1950.

/s/ J. J. O'LEARY,

Deputy Commissioner, Fourteenth Compensation District.

### Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mrs. Genevieve Long, Coastal Navigation Company, Park Rapids, Minnesota, c/o Alaska Transportation Co., Pier 51, Seattle, Wash.

Fireman's Fund Insurance Company; c/o Bogle, Bogle & Gates, Central Bldg., Seattle, Wash.

### Regular Mail

Bassett & Geisness, Attys., New World Life Bldg., 2nd & Cherry, Seattle 4, Wash.

/s/ J. J. O'LEARY,

Deputy Commissioner.

Mailed: June 16, 1950.

[Endorsed]: Filed June 28, 1950.

[Title of District Court and Cause.]

### APPEARANCE

To Plaintiffs Above Named, and to Bogle, Bogle & Gates, Attorneys for Plaintiffs:

You, and Each of You, will hereby please take notice that J. Charles Dennis, United States Attorney for the Western District of Washington, hereby enters his appearance as attorney for the defendant, J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, and you will please serve all notices, pleadings and papers in connection with said cause upon him at his address stated below.

/s/ J. CHARLES DENNIS,  
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1950.

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[Title of District Court and Cause.]

### DEFENDANT O'LEARY'S MOTION TO DISMISS PETITION

Comes now defendant, J. J. O'Leary, deputy commissioner, Bureau of Employees' Compensation, Department of Labor, by his attorneys and moves this Honorable Court to dismiss the petition for injunction filed herein for the following reasons:

1. That the petition does not state a cause of action and does not entitle plaintiffs to any relief,



nor does such petition state a claim against defendant upon which relief can be granted.

2. That it appears from the petition, including the transcript of testimony taken before the deputy commissioner on April 27, 1950, the exhibits, and the compensation order of June 16, 1950, complained of, that the employee's death in this case arose out of and in the course of his employment, and that the deceased employee was not a member of a crew of any vessel.

3. That it appears from the petition that the compensation order complained of is in all respects in accordance with law.

4. For such other good and sufficient reason as may be shown.

/s/ J. CHARLES DENNIS,

United States Attorney, Attorney for Deputy Commissioner O'Leary.

[Endorsed]: Filed October 11, 1950.

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[Title of District Court and Cause.]

MOTION OF UNITED STATES TO DISMISS

To the Clerk of the United States District Court:

Please place the Motion of the United States to dismiss plaintiff's complaint on the motion calendar for January 8, 1951.

BOGLE, BOGLE & GATES,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 21, 1950.

In the United States District Court for the Western  
District of Washington, Northern Division

No. 2585

COASTAL NAVIGATION COMPANY, a Corpo-  
ration, and FIREMAN'S FUND INSUR-  
ANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner Fourteenth  
Compensation District Under the Longshore-  
men's and Harbor Workers' Compensation Act,  
Defendant.

### MEMORANDUM AND ORDER

Plaintiffs seek herein a decree setting aside a compensation order made by the Deputy Commissioner for the Fourteenth Compensation District under the Longshoremen and Harbor Workers' Compensation Act (33 U.S.C.A. 901, et seq.) awarding to Mrs. Genevieve Long death benefits due to the death of her husband Frank Long resulting from injuries claimed to have been sustained by him while in the employ of plaintiff, Coastal Navigation Company. Plaintiff, Fireman's Fund Insurance Company, was the insurance carrier for Coastal in accordance with the provisions of that Act. The first objection to the order raises the question whether Long was a "member of a crew" and therefore excluded from the provisions of the Act. Section 903(a)(1). A second objection to the order is based

upon a claimed want of evidence to sustain the finding that Long was injured while in the ship's service.

The decedent Long was a seagoing man, an engineer of years standing. The Coastal Navigation Company had purchased two vessels, the Coastal Glacier and Coastal Forest, and at the time of the purchase contemplated their use in their Alaska run. Each used a complement of nine or ten men. They were taken to task by the Union which demanded some twelve or thirteen in the crew of each vessel. The company decided that the cost of operation was too great with this added operating cost, so, in March, 1947, removed the vessels from Ketchikan, Alaska, to Seattle, Washington, where they were moored at a pier landing at Kirkland on Lake Washington. All of the crews of both vessels were discharged except Long. He was the Chief Engineer on the Coastal Glacier and he was retained in that capacity. He lived on one of the vessels and as custodian had the duty of keeping both clean, trespassers away, etc. His main duty was to keep watch. He also was to oil the machinery and keep the vessels in mechanical condition so that the vessels would be ready for use by charter or otherwise on a day's notice. The Coastal Glacier sailed on short trips on a few occasions and when it did Long went along as the engineer.

One Haas, who was not a seagoing man, first talked with Long about taking Long's place while Long would be away in Minnesota on a contemplated trip to that state. Long was then to see the

agent of the company about employing Haas. Haas came back to the pier a few days later and found Long stretched out on his bunk in the Coastal Glacier. Long told him he had slipped and fallen while going down into the engine room. Long died from a bilateral hernia with strangulation.

Haas, after the injury and death of Long, stayed on as the watchman and caretaker of the ships. He likewise lived on one of them, although he was not paid subsistence. After Long's death a Mr. Nilsen was employed to turn over the engines and keep them in good working order, and this he does once a month. The vessels are diesel engine powered and required a diesel man to operate and Long was a diesel engineer. Haas was neither a diesel engineer nor a marine engineer. Although the evidence is obscure upon the point it is to be inferred that the operation of the generators, a daily duty of Long, was performed by Haas after he took charge.

This court is not empowered to weigh or appraise the evidence before the Deputy Commissioner. If there is evidence to support the order the award must be given effect. *South Chicago Coal & Dock Co.*, 309 U. S. 251. The power to suspend or set aside a compensation order exists only if the order is "not in accordance with law." Section 21(b) of the Act. If, and only if, the award is founded upon an error in law, such as the misconstruction of a term of the Act, may it be set aside. *Norton v. Warner Co.*, 321 U. S. 565.

Long was permanently attached to the vessel. He lodged there and he was provided subsistence

aboard. He was paid monthly. These are characteristics of employment of crew members. The Coastal Glacier was kept in condition to sail promptly. The owner was endeavoring to obtain satisfactory charters for her and, had she been chartered, a condition of chartering would have been that Long go aboard as engineer. All of the duties performed by Long as detailed above were maritime in character.

The Act in question provides compensation for a class of workers whose work is maritime in nature and therefore not constitutionally compensable under state law. The exception of master and members of a crew was inserted at the insistence of seagoing men who preferred the existing protection of maritime law, including maintenance and cure, the remedy for injuries in the course of employment under the Jones Act, and the remedy in admiralty for injuries resulting from unseaworthiness. The remedy under the Act is exclusive. It was designed to provide compensation "in the stead of liability for a class of employees commonly known as Longshoremen. These men are mainly employed in loading, unloading, refitting and repairing ships." Senate Report No. 973, 69th Cong. 1st Sess., p. 16. Long's work can not be said to fit into that category. The worker's status is determined by his duties. If his work is that "of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation," he comes within the benefit of the Act. *South Chicago Co. v. Bassett*, 309 U. S. 251, 260.

Point is made of the fact that the evidence supports a finding that Long's main duty was to guard the boat from trespassers and any other possible sources of danger. Traditionally this is a work performed by the crew. It is rendered none the less work of a crew because sometimes, or often, private patrol agencies are engaged to perform guard duty while ships are in port. Though the benefits under the Act may inure to harbor workers who are neither longshoremen, repairmen nor engaged in refitting but who are temporarily on board to render services while the ship is in port, it does not follow that a member of the ship's company who remains on board in port ceases to be a member of the crew by devoting a major part of his time while in port to guard duty. Long's work was in furtherance of the trade in which the ship was engaged and was essential to the successful and continuing operation of the ship. Navigation is not limited to "putting over the helm." Norton case, *supra*, page 572. He was injured while on his way down into the engine room, presumably in connection with his duty to keep the machinery in condition. Cf. *Doffin v. Pape*, 170 F 2d 622. The ship was being kept in shape for a voyage and therefore was in navigation. *Carumbo v. Cape Cod S.S. Co.*, 123 F 2d 991; *Jones v. Shepherd*, 20 F. Supp. 345; *Carvalho v. Fregata*, 42 F. Supp 404.

We now move to plaintiff's second objection. As before noted, Haas testified that when he found Long upon his bunk upon the boat Long told him that he had slipped and fallen when he went to the

engine room of the Coastal Glacier. He was suffering from a swelling in the right lower abdomen "about as big around as the size of a quart jar lid." The Act provides that a declaration of a deceased employee concerning the injury shall be received in evidence and shall "if corroborated by other evidence" be sufficient to establish the injury. I consider that there is sufficient corroboration. Where an injury occurs at the place of employment it is presumed that the injury has arisen out of and in the course of employment. See annotations in 49 A.L.R. 426 to 436. There was no evidence before the Deputy Commissioner that the injury was sustained other than while Long was performing his duties upon the vessel and it is to be presumed "that the claim comes within the provisions of the Act." Section 920(a). See *Marra Bros. Inc., v. Cardillo*, 154 F 2d 357.

Long's statement as to how he was injured is corroborated by the nature of his injury as described by Haas and the diagnosis and cause of death as disclosed by hospital records. It is common knowledge that a hernia may be and is often caused by a fall. The circumstances that he was found disabled at the place of employment, the disability was a hernia and hernia is often caused by a fall constitute sufficient corroboration. *Associated General Contractors v. Cardillo*, 106 F 2d 327. Whatever tends to make a story substantially more credible or probable corroborates it. *Associated General Contractors v. Cardillo*, 106 F 2d 327. The last mentioned case

cites other cases in which awards have been sustained and where fatal injuries were unwitnessed. It was there contended, as it might be contended here, that the evidence could have supported a finding that the fatal trauma was caused by a boxing bout. The court brushed this aside with the statement that it was not concerned with the relative weight of evidence. The facts in *Marra Bros. v. Cardillo*, 154 F 2d 357, presents an unwitnessed fatal injury. An award to the widow was sustained. Likewise there it was contended that the deceased might have met his death by foul play. The court disposed of this argument with a ruling to the effect that the known facts cast the burden upon the plaintiffs to prove that the death did not arise out of or in the course of employment. In *Salmon Bay Sand & Gravel Co. v. Marshall*, 93 F 2d 1 (9th Cir.), an award to the widow was sustained upon inference of death drawn from the fact that deceased disappeared during a voyage of a vessel upon which he was employed.

These cases are in accord with the rule of liberal construction in favor of the injured employee or his dependents in proceedings under the Act. *Baltimore v. Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408.

The permissible inference of in-service injury from the fact that the employee was found with an injury at the place of employment is sufficient to sustain the challenged finding. It is also sufficient corroboration of the hearsay statement.

Having concluded that Long's employment was



within the exception the motion to dismiss should be and is denied.

Dated: January 30th, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed and entered January 30, 1951.

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[Title of District Court and Cause.]

### MOTION TO INTERVENE

Comes now Genevieve Long and moves the court for an order permitting her to intervene as an additional party defendant in the above-entitled action.

The grounds for this motion are:

(1) The movant is the surviving spouse of Francis L. Long, deceased, and the beneficiary of any award made or to be made under the Longshoremen's and Harbor Workers' Compensation Act, and in fact has received some benefits by virtue of the award heretofore made herein by the Deputy Commissioner of the Fourteenth Compensation District and will be deprived of any further compensation if the plaintiff's petition herein be granted.

This motion is accompanied by an answer to the petition herein.

/s/ J. DUANE VANCE,

BASSETT & GEISNESS,

Attorneys for Genevieve  
Long.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1951.

[Title of District Court and Cause.]

### NOTICE OF HEARING

To the Plaintiffs Above Named and to Bogle, Bogle  
and Gates, Their Attorneys:

To the Defendant Above Named and to J. Charles  
Dennis, U. S. District Attorney, His Attorney:

To the Clerk of the Above-Entitled Court:

Notice is hereby given that on Monday, the 12th  
day of February, 1951, at the hour of 10:00 a.m.,  
intervenor will bring on for hearing her motion to  
intervene and motion to remand for the taking of  
additional testimony.

/s/ J. DUANE VANCE,  
BASSETT & GEISNESS,  
Attorneys for Intervenor.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1951.

In the United States District Court for the Western  
District of Washington, Northern Division

No. 2585

COASTAL NAVIGATION COMPANY, a Cor-  
poration, and FIREMAN'S FUND INSUR-  
ANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner Fourteenth  
Compensation District, Under the Longshore-  
men's and Harbor Workers' Compensation Act,  
Defendant.

## ORDER GRANTING LEAVE TO INTERVENE

This matter having come duly and regularly be-  
fore the Court upon the motion of Genevieve Long  
to intervene in the above-entitled cause as an addi-  
tional party defendant, all parties being represented  
by their respective counsel, and the Court having  
considered the files and records herein and the  
statements of counsel, now, therefore, it is

Ordered, Adjudged and Decreed that the motion  
of Genevieve Long to intervene herein as an addi-  
tional party defendant be and it is hereby granted.

Done in Open Court this 6th day of February,  
1951.

/s/ DAL M. LEMMON,

U. S. District Judge.

Presented by :

/s/ J. DUANE VANCE,

Of Counsel for Intervenor,

Approved as to Form:

BOGLE, BOGLE & GATES.

[Endorsed]: Filed February 6, 1951.

---

[Title of District Court and Cause.]

## ANSWER OF INTERVENOR TO PETITION FOR INJUNCTION

Answering the petition for injunction herein the intervenor admits, denies and alleges as follows:

### I.

Answering paragraphs I, II, III, V, VII, and IX of said petition intervenor admits the same.

### II.

Answering paragraph IV of said petition intervenor admits all of said paragraph save and except the allegation that one Frank Long was chief engineer and a member of the crew of the SS. Coastal Glacier.

### III.

Answering paragraph VI intervenor admits that J. J. O'Leary made the order therein mentioned, but denies that said order was erroneous or illegal.

### IV.

Answering paragraph VIII of said petition the intervenor denies the same.

By way of further answer to said petition intervenor alleges:

I.

That the decedent Francis L. Long was at the time of the sustaining of the injury from which he died not a member of the crew of the SS. Coastal Glacier but was in truth and fact a watchman and was designated as such on the payroll records of the Coastal Navigation Company, his employer.

Wherefore, having fully answered, the intervenor prays that the plaintiffs' petition herein be dismissed and that the intervenor have and recover here costs herein and that a reasonable sum for the services of her attorneys herein be fixed by the court.

/s/ J. DUANE VANCE,  
BASSET & GEISNESS,  
Attorneys for Intervenor.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1951.

---

[Title of District Court and Cause.]

MOTION TO REMAND FOR THE TAKING OF  
ADDITIONAL TESTIMONY

Comes now the intervenor herein, Genevieve Long, and moves the Court for an order remanding this cause to the Deputy Commissioner of the Fourteenth Compensation District of the United States Employees' Compensation Commission for the taking of additional testimony.

The testimony sought to be adduced by the in-

tervenor at such hearing is that the Coastal Navigation Company herein, the employer of Francis L. Long at the time of his death carried said decedent on their payroll records as a watchman. Said proof would consist of the introduction of the accounting stub of the payroll check last received by Francis L. Long, a copy of which is attached hereto, and a similar stub for his pay covering the period of February 1 to February 29, 1948, copy of which is also attached hereto.

This motion is based upon the files and records herein and the affidavit of counsel hereto attached.

/s/ J. DUANE VANCE,  
BASSETT & GEISNESS,  
Attorneys for Intervenor.

(Copy)

### Statement of Remittance

No Receipt Necessary

Detach before depositing in Bank

Coastal Navigation Co.—Watchman

Wages 2/1-29/48		250.00
Less Soc. Sec.	2.50	
“ With. Tax	35.50	38.00
		<hr/>
		212.00

Alaska Transportation Company—Pier 58, Seattle  
1, Washington.

(Copy)

Statement of Remittance

No Receipt Necessary

Detach before depositing in Bank

Coastal Navigation Co.

Watchman: 4/1-4/30/48		250.00
• Less Soc. Sec.	2.50	
With. Tax	35.50	38.00
		<hr/>
		212.00

Alaska Transportation Company—Pier 58, Seattle  
1, Washington.

---

[Title of District Court and Cause.]

AFFIDAVIT OF J. DUANE VANCE

United States of America,  
State of Washington,  
County of King—ss.

J. Duane Vance, being first duly sworn, on oath  
deposes and says:

That he is one of the attorneys for the intervenor  
named herein.

That prior to the hearing before the Deputy Com-  
missioner in the above-entitled cause on the 27th  
day of April, 1950, and to wit, on the 19th day of  
April, 1950, your affiant secured from said Deputy  
Commissioner, J. J. O'Leary, a subpoena duces  
tecum directed to A. H. Link, Treasurer of the  
Coastal Navigation Company, Pier 57, Seattle,  
Washington, directing him to appear at said hearing

and to bring with him and produce at said hearing the following books, papers and documents:

“The pilot house log and the engine room log of the vessel Coastal Glacier covering the period from July, 1946, to May 7, 1948, and all time card, payroll records and other documents relative to the employment and pay of Mr. Francis L. Long from July, 1946, until May 7, 1948.”

Your affiant immediately placed said subpoena in the hands of a process server, to wit, Larimore's Legal Process Service, who was unable to serve said Link and reported in writing to your affiant that said Link was “not at this address, dock is locked.” Your affiant thereafter advised counsel for the Fireman's Fund Insurance Company, the carrier herein, Edward S. Franklin, of his inability to locate said Link and serve him with said process, whereupon said Franklin stated that Mr. Link would be present at said hearing and that he would voluntarily produce the books, papers and documents requested in said subpoena.

At the time of the hearing said Link did appear to testify and produced the log books called for in such subpoena, but wholly failed to produce any of the requested time cards, payroll records or other documents and a representation was made to your affiant by either Mr. Link or Mr. Franklin, your affiant not now remembering which, either that said records could not be located or they contained no information pertinent to the issue in this case. Your affiant had no knowledge of what might be contained in the employer's records, but had had said subpoena drawn in the anticipation that said records



would disclose the capacity in which the decedent was employed at the time of his death. Since your affiant had no knowledge of what was contained in said records, your affiant was in no position to either ask for a continuance or to insist upon the production of said records by the Coastal Navigation Company. It was stipulated before the hearing that the intervenor herein Genevieve Long was the surviving spouse of said decedent and the person entitled to compensation, if any, and since she resided in Minnesota and was there at the time of the accident and death herein and had no knowledge of the facts of the case your affiant advised her not to incur the expense of coming to the hearing.

After the award of the Commissioner and the petition for injunction was filed herein your affiant advised the intervenor and requested her instructions on further proceedings. The intervenor required your affiant to state fully the contentions of all parties and upon same having been explained to her she made a thorough search of all of her deceased husband's personal effects and found the two payroll check vouchers attached to the motion herein.

/s/ J. DUANE VANCE.

Subscribed and sworn to before me this 5th day of February, 1951.

[Seal]      /s/ JOHN GEISNESS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 6, 1951.

In the United States District Court for the Western  
District of Washington, Northern Division

No. 2585

COASTAL NAVIGATION COMPANY, a Corporation,  
and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,  
Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, Under the Longshoremen's & Harbor Workers' Compensation Act,  
Defendant.

### MEMORANDUM AND ORDER

This action is a proceeding to have it be declared that the compensation order of the Deputy Commissioner is not in accordance with law, to have the same set aside "through injunction proceedings," as provided by Section 921(b) of Title 33 U.S.C.A. It is designed to review the action of an administrative agency. As pointed out in *Bassett v. Massman Const. Co.*, 120 F. 2d 230, "It lacks a cardinal characteristic of ordinary injunction proceedings directed at administrative orders in that there is (except as to jurisdictional issues) no trial de novo of the facts \* \* \*. Also, the reviewing court is acting really as a court in admiralty with the power to grant injunctive relief especially given by this section." Since there has been no trial of issues of fact before this court there is nothing which re-

quires or permits the making of findings of fact herein.

The petition should have been filed on the admiralty side of this court. Twin Harbor Stevedoring Tug Co. v. Marshall, 103 F. 2d 513.

It is Ordered, Adjudged and Decreed that the petition of the plaintiffs for an injunction herein be treated as a libel and the injunction be granted, and defendant J. J. O'Leary, Deputy Commissioner of the Fourteenth Compensation District under the Longshoremen's & Harbor Workers' Act, be, and he is permanently enjoined and restrained from enforcing or attempting to enforce that certain compensation order entered by him on June 16, 1950, awarding death benefits to the decedent Frank L. Long under the terms and provisions of the Longshoremen's & Harbor Workers' Act; and that said order be, and it is vacated, set aside and held for naught.

Dated: February 15, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 15, 1951.

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[Title of District Court and Cause.]

PROPOSED ORDER DENYING MOTION FOR  
DISMISSAL AND GRANTING INJUNCTION

This Matter having come on to be heard before the undersigned, one of the Judges of the above-

entitled Court, at Seattle, Washington, on January 8, 1951, upon the motion of the defendant to dismiss the complaint of the plaintiffs for injunction herein; and the plaintiffs being represented by their attorneys, Messrs. Bogle, Bogle & Gates, and defendant J. J. O'Leary as Deputy Commissioner, being represented by the Hon. J. Charles Dennis, United States District Attorney, and the claimant widow, Mrs. Genevieve Long, being represented by her attorney, J. Duane Vance; and the court having listened to the argument of counsel and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law herein; now, therefore,

It is Ordered, Adjudged and Decreed that the defendant's motion to dismiss the complaint of the plaintiffs for injunction herein be denied, for the reason that said decedent Frank L. Long was not subject to the terms and provisions of the Longshoremen's & Harbor Workers' Act at the time of his death on May 7, 1948, but was a member of the crew of the SS "Coastal Glacier" at said time; and,

It Is Further Ordered, Adjudged and Decreed that the petition of the plaintiffs for an injunction herein be granted, and defendant J. J. O'Leary, Deputy Commissioner of the Fourteenth Compensation District under the Longshoremen's & Harbor Workers' Act, be permanently enjoined and restrained from enforcing or attempting to enforce that certain compensation order entered by him on June 16, 1950, awarding death benefits to the decedent Frank L. Long under the terms and pro-

visions of the Longshoremen's & Harbor Workers' Act; and that said order be vacated, set aside and held for naught.

Done in open court this . . . . day of February, 1951.

.....,

Judge.

Presented by:

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

Approved as to form only.

Notice of Presentation Waived:

/s/ J. CHARLES DENNIS,

U. S. District Attorney.

.....,

Attorney for Claimant, Mrs.

Genevieve Long.

Lodged February 15, 1951.

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[Title of District Court and Cause.]

## PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on to be heard at Seattle, Washington, on January 8, 1951, before the undersigned, upon the motion of the defendant to dismiss the complaint of the plaintiffs for an injunction; and the plaintiffs being represented by their attorneys, Bogle, Bogle & Gates, and defendant, J. J.

O'Leary, Deputy Commissioner, Fourteenth Compensation District, being represented by the Hon. Charles Dennis, United States District Attorney, and the claimant widow, Genevieve Long, being represented by her attorney, J. Duane Vance; and the court having listened to the argument of counsel and being fully advised in the premises, now enters the following

### Findings of Fact

#### I.

That decedent Frank Long was a sea-going and maritime engineer of many years standing, and joined the vessel "Coastal Glacier" as Chief Engineer in Alaska in 1946 when said vessel was purchased by the Coastal Navigation Company, his employer.

#### II.

That the Coastal Navigation Company could not operate the "Coastal Glacier" or its sister ship "Coastal Forest" profitably in Alaskan waters, because of union manning demands, so both vessels, with decedent aboard the "Coastal Glacier" as Chief Engineer, sailed to Seattle, Washington, where the vessels were subsequently moored in Lake Washington, awaiting charters.

#### III.

That all of the crews of both vessels were discharged when the vessels reached Seattle except decedent, who was retained in the capacity of Chief

Engineer aboard the "Coastal Glacier" until his death on May 7, 1948.

IV.

That decedent's main duties were to keep the "Coastal Glacier" in mechanical readiness for anticipated charters, test and keep the machinery of the "Coastal Glacier" in repair, and keep watch on the vessel; that similar duties were also performed by the deceased on the "Coastal Forest."

V.

That on several occasions the deceased served as Chief Engineer on the "Coastal Glacier" when she was involved in short trips about Puget Sound; that the deceased lived aboard the vessel and was paid monthly wages; that the employer, Coastal Navigation Company, required that in any charter it was successful to obtain for the "Coastal Glacier" that decedent should serve aboard the vessel as Chief Engineer.

VI.

That the deceased was permanently attached to the "Coastal Glacier" for navigational purposes and his death occurred while on his way down to the engine room of the "Coastal Glacier" presumably in connection with his duties of keeping the machinery of the vessel ready for navigational purposes.

Done in open court this .... day of February, 1951.

.....,

Judge.

From the foregoing Findings of Fact, the Court now enters its

### Conclusions of Law

#### I.

That decedent was a member of the crew of the SS "Coastal Glacier" at the time of his death in the engine room of said vessel on May 7, 1948, at Seattle, Washington, and was excluded by the provisions of § 3 (a) (1) from the provisions and benefits of the Longshoremen's & Harbor Workers' Act.

#### II.

That defendant's motion to dismiss plaintiff's complaint for injunction be denied with prejudice.

#### III.

That the petition of the plaintiffs for injunction be granted, and defendant J. J. O'Leary, as Deputy Commissioner of the Fourteenth Compensation District under the Longshoremen's & Harbor Workers' Act, be permanently enjoined and restrained from enforcing that certain compensation order entered by him on June 16, 1950, awarding to Mrs. Genevieve Long, surviving widow of decedent Frank Long, death benefits under the Longshoremen's & Harbor Workers' Act, and that said order be vacated, set aside and held for naught.

Done in open Court this .... day of February, 1951.

.....,  
Judge.



Presented by:

/s/ EDW. S. FRANKLIN,  
Attorneys for Plaintiffs.

Approved as to form only.

Notice of Presentation waived:

/s/ J. CHARLES DENNIS,  
U. S. District Attorney.

.....,  
Attorney for Claimant, Mrs.  
Genevieve Long.

Lodged February 15, 1951.

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[Title of District Court and Cause.]

EXCEPTIONS TO PROPOSED FINDINGS OF  
FACT AND CONCLUSION OF LAW AND  
DECREE

I.

Intervenor excepts to the conclusion of law and decree on the grounds that same are contrary to law and further excepts to the entry of the proposed decree granting an injunction and vacating the order of the Deputy Commissioner on the grounds that same is premature.

II.

Intervenor excepts to the entry of any findings of fact by the Court on the grounds and for the reason that the Court is empowered only to grant

an injunction on the basis that the compensation order is "not in accordance with law" as provided in Section 921 of Title 33 U.S.C.A.

### III.

Intervenor excepts to the proposed findings of fact as to form in the following particulars:

1. Intervenor excepts to proposed finding of fact No. III insofar as the same states "who was retained in the capacity of chief engineer," for the reason that the evidence and the payroll records conclusively show that he was retained in the capacity of watchman.

2. Intervenor excepts to finding of fact No. IV insofar as the same states that the decedent's main duties were to keep the Coastal Glacier in mechanical readiness and to test and keep the machinery of the Coastal Glacier in repair and keep watch on the vessel, for the reason that the evidence was conclusively, and the Court stated in its memorandum opinion at page 2, that Long's "main duty was to keep watch."

3. Intervenor excepts to finding of fact No. VI insofar as the same finds that the deceased was attached to the Coastal Glacier for navigational purposes, on the ground that the evidence was and the Commissioner found that he was attached to the vessel for non-navigational purposes.

### IV.

Intervenor excepts to the proposed findings of fact for their failure to include the following:

1. Intervenor excepts to the failure of the Court

to find that the vessel made no trips from September, 1947, until May 2, 1948, and that during that time it remained tied to the dock.

2. Intervenor excepts to the failure of the Court to find that the deceased was carried on the payroll records of the company as a watchman.

3. Intervenor excepts to the failure of the Court to find that at the time of his injury the deceased was performing service for his employer in his capacity as caretaker.

/s/ J. DUANE VANCE,  
BASSETT & GEISNESS,  
Attorneys for Intervenor.

[Endorsed]: Filed February 15, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Coastal Navigation Company, a Corporation,  
and Fireman's Fund Insurance Company, a  
Corporation, plaintiffs herein; and to Bogle,  
Bogle & Gates, plaintiffs' attorneys; and to  
Mrs. Genevieve Long, intervenor, and J. Duane  
Vance, her attorney:

Notice is hereby given that the defendant above  
named, J. J. O'Leary, Deputy Commissioner, Four-  
teenth Compensation District, hereby appeals to the  
United States Court of Appeals for the Ninth Cir-  
cuit from the Order entered in the above court

January 30, 1951, and the order entered on the 15th day of February, 1951, and each thereof.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ JOHN E. BELCHER,  
Asst. U. S. Attorney.

Copies mailed.

[Endorsed]: Filed March 23, 1951.

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Federal Security Agency, Bureau of Employees'  
Compensation, Before J. J. O'Leary, Deputy  
Commissioner, Fourteenth Compensation Dis-  
trict.

Case No. 1091-1

GENEVIEVE LONG, Widow of Deceased,  
Claimant,

vs.

COASTAL NAVIGATION COMPANY,  
Employer,

FIREMAN'S FUND INSURANCE COMPANY,  
Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice this matter was heard before J. J. O'Leary, Deputy Commissioner, Federal Security Agency, Bureau of Employees' Compensation, Seattle, Washington, on April 27, 1950.

Appearances:

MR. J. DUANE VANCE,  
Attorney, Representing the Claimant.

BOGLE, BOGLE & GATES, By  
MR. E. S. FRANKLIN,  
Attorneys for Employer and Carrier,  
Central Bldg., Seattle.

Proceedings

Deputy Commissioner J. J. O'Leary: This hearing is upon the application of Mrs. Genevieve Long, who as surviving wife of Francis L. Long has filed a claim for death benefits in consequence of the death of her husband on May 7, 1948, while he was employed by Coastal Navigation Company, death allegedly having resulted from an injury sustained by the deceased on May 2, 1948, at or near Kirkland, Washington, aboard the vessel "Coastal Glacier." No report of this alleged injury was filed by the employer, and the claim for death benefits was filed in the office of the Deputy Commissioner on December 12, 1949.

Now, Mr. Vance, will you be good enough to state for the record just what is the basis of your claim at this time?

Mr. Vance: The basis of the claim is that Mr. Francis L. Long sustained an injury aboard the "Coastal Glacier" on or about May first or second, 1948, which resulted in his death several days later; that at the time of the injury his employment was in the nature of a harbor worker, bringing him within the purview of the Longshoremen's and Harbor Workers' Compensation Act, and as the result

of said injury and death his surviving spouse, Mrs. Genevieve Long, is entitled to compensation under that Act.

Deputy Commissioner: Mr. Franklin, will you please state the position of the employer and carrier? [2\*]

Mr. Franklin: The position of the employer, Coastal Navigation Company, and the carrier, Fireman's Fund Insurance Company, is that the deceased did not die of an injury sustained in the course of his employment on May 2, 1948. It is further denied that both the decedent, Francis L. Long, and his former employer, Coastal Navigation Company, were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury of the decedent. It is further denied that the claim filed by Mrs. Genevieve Long was filed within the period required by the statute of limitations. It is further alleged by the employer and carrier that at the time of the last illness of the deceased, he was a member of the crew of the S. S. Coastal Glacier and was not under the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act.

As an alternative defense, employer and carrier assert that the Coastal Glacier was a decommissioned vessel at the time of decedent's death and deceased was subject to the State Workmen's Compensation Act.

Mr. Vance: I will call Miss Krafve. [3]

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

MISS BETTY MARION KRAFVE.

being first duly sworn, testified as follows:

Direct Examination

By Mr. Vance:

Deputy Commissioner: State your full name?

A. Betty Marion Krafve.

Q. (By Mr. Vance): Miss Krafve, what is your occupation?

A. Medical Record Librarian at U. S. Marine Hospital.

Q. And as such do you have custody of the clinical records of the hospital? A. Yes, sir.

Q. You are here in response to a subpoena, requesting you to bring with you the records pertaining to the illness and death of Francis L. Long, are you? A. Yes.

Q. Do you have those records with you?

A. Yes, sir; I have.

Q. Referring to Claimant's Exhibit 1, will you please state what that is?

Mr. Franklin: Employer and carrier will stipulate that the clinical record referred to as Claimant's Exhibit 1 are the records of the U. S. Marine Hospital pertaining to the deceased and may be introduced in evidence.

Deputy Commissioner: The record of the U. S. Marine Hospital is identified as Register No. [4] 51-020, and will be received in evidence and will be marked Claimant's Exhibit 1.

(Testimony of Miss Betty Marion Krafve.)

Cross-Examination

By Mr. Franklin:

Q. Miss Krafve, you are attached to the staff of the U. S. Marine Hospital? A. Yes.

Q. And that is an institution that cares for merchant seamen who become sick and ill?

A. Yes.

Mr. Franklin: That is all, thank you.

(Witness excused.)

Mr. Vance: I will call Mr. Haas. [5]

HARLAN C. HAAS

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Vance:

Mr. O'Leary: State your full name and home address?

A. Harlan C. Haas.

Q. Where do you live?

A. Kirkland, Washington.

Q. (By Mr. Vance.) What is your occupation?

A. I am caretaker for Coastal Navigation Company.

Q. What do you take care of?

A. "Coastal Forest," "Coastal Glacier," and the Yard.



(Testimony of Harlan C. Haas.)

Deputy Commissioner: Those are the vessels, "Coastal Forest" and "Coastal Glacier"?

A. Yes.

Q. (By Mr. Vance): Did you say you also take care of the yard?

A. Yes, sir. Since they bought the Yard, I take care of the Yard.

Q. How old a man are you?

A. I will be sixty in October.

Q. What has been your occupation in the past?

A. I am a painter by trade.

Q. Have you ever gone to sea? [6]

A. No, I have not.

Q. You never served as a member of the crew of a vessel? A. No.

Q. When were you first employed by the Coastal Navigation Company? A. May 4, 1948.

Q. Who hired you?

A. Coastal Navigation Company.

Q. What person hired you? A. Mr. Clapp.

Q. Do you know Mr. Clapp's first name?

A. Norton.

Q. Where did you first interview Mr. Clapp about the job?

A. I saw him first on Thursday. That would be the sixth of May when I first saw Mr. Clapp.

Q. What day of May?

A. Sixth day of May.

Q. I think you stated a minute ago you were hired on the fourth.

A. Mr. Long told me I was to stay there until

(Testimony of Harlan C. Haas.)

Mr. Clapp came and I understood at that time I was hired.

Q. You first talked to Mr. Long about the job?

A. Yes. Mr. Long was planning to go back to Minnesota for a vacation and he told me to come down there on the first but I could not come on the first, so that was on Saturday. [7]

Q. When did you first talk to Mr. Long about the job?

A. About two or three days before the first.

Q. About two or three days before the first of May?

A. Yes.

Q. That was Mr. Frank Long?

A. That was Mr. Frank Long. He asked me at that time if I would take care of the vessel while he was gone and I told him I didn't know anything about it but I would take his place and he said he would speak to the Company about it.

Q. In that interview did Mr. Long tell you what the nature of the duties would be in his absence?

A. No, he did not. He told me he would come down and he would show me what to do.

Q. He told you generally what the job consisted of, did he not?

A. Yes, to keep the boat clean and in charge of electricity.

Q. When did he tell you he planned to go back to Minnesota?

A. He was to leave on the fourth or the third or fourth, I have forgotten now which.

(Testimony of Harlan C. Haas.)

Q. That would have been what day in the week?

A. The fourth was on Tuesday, so that would be Monday or Tuesday, I forget which.

Q. What arrangements did you make with him about coming down to the boat? [8]

A. I was to come down there and he was to teach me what to do.

Q. What day of the week were you going to go down to the boat?

A. I was supposed to be there on Saturday.

Q. What happened? Tell us in your own words.

A. On Saturday the wife and I had to come to Seattle on business. We live in Kirkland and had to come on business. Our business took us longer than we thought it would and I didn't get down on Saturday, which was the first of May, so I didn't get down until Sunday and I went down there about one o'clock and Long was not home, so I went back home and then I went back on Monday about ten o'clock and still didn't find no one there; so there was an old fisherman, who comes out quite often; and he came up about one o'clock, I should judge, and I happened to be home that day on account of the wife being sick, so I was home and I didn't go down to the boat and this old fellow said Mr. Long wanted to see me and I went down to the boat and found him in his cabin and he said he had slipped and got hurt.

Mr. Franklin: The employer and carrier objects to any statements alleged to have been made by the decedent to this or any other witnesses on the

(Testimony of Harlan C. Haas.)

ground that it is incompetent unless supported by corroborating evidence.

Deputy Commissioner: Was anyone present [9] when Mr. Long made that statement?

Witness: No.

Deputy Commissioner: I will sustain the objection.

Mr. Vance: They are corroborated by clinical evidence, Exhibit 1, the statements and history having been given to the hospital by the deceased. I know you have had no opportunity to see the exhibit.

Deputy Commissioner: Subject to corroboration, I will allow the question.

Q. (By Mr. Vance): Tell us what Mr. Long told you at that time.

A. He told me he had slipped and fell.

Q. Did he tell you where that fall had occurred?

A. He said when he went to the engineroom.

Q. The engineroom of what?

A. Coastal Glacier.

Q. And what was his condition at that time?

A. He seemed to be sick and he didn't feel very good.

Q. Where did this take place and where were you at this time?

A. I was in the cabin talking to him and he was in his bunk on the Coastal Glacier.

Q. Just go ahead and tell us what happened then.

A. Well, I went in and he said: "I slipped and hurt myself." [10]

(Testimony of Harlan C. Haas.)

Mr. Franklin: It is understood, Mr. O'Leary, that my objection applies to all this testimony, subject to its corroboration.

Deputy Commissioner: That's correct.

Witness (Continuing): So I says to him: "Frank, we should get a doctor." "No," he says, "Let's wait until tomorrow." "No," I says, "You should get a doctor today. When did you slip?" And he said Sunday and he said, "Do you know of a good doctor?" and I says, "I don't know of any. I am a stranger in town." And he says, "Go and find one" and I tried to find one and I went to the Kirkland Hospital and talked to this here doctor that came down here. I have forgotten his name.

Q. Did you notice Mr. Long's physical condition, anything unusual about him? A. No.

Q. Did you notice any injury that he appeared to have of any kind?

A. No; I didn't, no. I didn't know anything about what was the trouble until the doctor was there.

Q. Did you attempt to do anything for Mr. Long before the doctor arrived?

A. He asked for a glass of milk and I gave him a glass of milk.

Q. And what happened? Was he able to retain the milk? [11]

A. No, hardly any. He throwed it up.

Q. Did you have occasion to look at Mr. Long's stomach? A. Not until the doctor came.

(Testimony of Harlan C. Haas.)

Q. What hapened when the doctor came?

A. The doctor examined him and said, "We have got to take you to the hospital" and I went with the doctor to a 'phone and the doctor called up and found he was subject to the Marine Hospital. Then I went back and took care of Mr. Long until the ambulance came.

Q. Did you have occasion to see Mr. Long in the presence of the doctor?      A. Yes, I did.

Q. What was his condition?

A. He was swollen quite large.

Q. Where was the swelling?

A. Right lower abdomen.

Q. What kind of a swelling was it?

A. I can't explain that.

Q. How big?

A. About as big around as the size of a quart jar lid, I would say.

Q. When did you then take over your present duties there?

A. I stayed right there. I never left the boat after that. After he left I stayed on the boat.

Q. Where is it these boats are anchored? [12]

A. Anchored at Kirkland.

Q. At a dock or what?

A. At a dock, yes, sir.

Q. Did the dock have a name?

A. It used to be known as the old Ballinger Dock.

Q. Just briefly describe that dock.

A. It is about 200 feet long and four feet wide.

(Testimony of Harlan C. Haas.)

Q. What facilities are there, in the way of buildings and equipment?

A. A long building on the lot and it is all cement floor.

Q. It is all one building? A. Yes.

Q. And what is that building used for? What is its nature? A. It is used as storage.

Q. Storage of what kind of material? What is stored in it? A. Steel rope and so on.

Mr. Franklin: May I interrupt?

Q. When was that acquired by Coastal Navigation Company?

A. That was not acquired by the Company until September of last year.

Q. September of '49?

A. After Mr. Long passed away.

Q. (By Mr. Vance): At the time of Mr. Long's death, what boats were [13] anchored there?

A. Coastal Forest and Coastal Glacier.

Q. There were no other boats there?

A. No other boats, no, sir.

Q. When you took over there on that day, what duties were you to perform?

A. When I took over there I was just to keep the boats clean. That was my duties. I would say it was his duties, the same as I am now, to keep them clean.

Q. You are referring to both the Coastal Glacier and the Coastal Forest? A. Yes, sir.

Q. What do you mean by keeping them clean?

A. Keeping them swept down and washed up and keeping them clean in general.

(Testimony of Harlan C. Haas.)

Q. Do you have any duties with reference to keeping a watch on the boats to keep trespassers off?

A. Yes, sir. I do. I have orders to keep them off. They are allowed on the dock but not on the boats whatsoever.

Q. Did you have any duties in connection with navigation of the boats? A. No, sir.

Q. You have been there ever since that time, have you? A. I have.

Q. And Mr. Long died, did he, without returning to the [14] boat?

A. He never came back; no.

Q. How long had you known Mr. Long prior to that?

A. I would say maybe two weeks. I would not think much more than that. I was not employed at the time. I used to go down there fishing. We could fish off the dock but not off the boats.

Q. Is that how you became acquainted with him, by going down there fishing? A. That's right.

Q. How are those boats moored to the dock?

A. Tied there with ropes.

Mr. Vance: I think that is all.

### Cross-Examination

By Mr. Franklin:

Q. Mr. Haas, do you know what Mr. Long's occupation was?

A. He told me that he was a Chief Engineer.

Q. Do you know how long he had been attached



(Testimony of Harlan C. Haas.)

to the boat or associated with the Coastal Glacier as Chief Engineer before his death?

A. He told me he had been with them for three years.

Q. Did he tell you that he had joined the vessel in Alaska as Chief Engineer?

A. I believe that he did. I wouldn't say for sure because I don't remember. [15]

Q. When you first made his acquaintance, where was he living?

A. He was living on the Coastal Glacier.

Q. What duties as Chief Engineer did Mr. Long perform on the Coastal Glacier to your knowledge from what you saw?

A. I know he run the auxiliaries. He told me he had to run the auxiliaries to keep up the electricity.

Q. What do you mean by running the auxiliaries?

A. An auxiliary is what they charge the electricity for the boats.

Q. How is the Coastal Glacier powered? Diesel power?

A. Yes, sir.

Q. And what other work, mechanical work or engineering work, did Mr. Long perform aboard the vessel to your knowledge?

A. As to that I couldn't say altogether because I was not there all the time. I was only there two or three times, three or four may be.

Q. Did you ever see him operate the generator?

A. No. I never did see him. I never was in the engineroom until I took over.

(Testimony of Harlan C. Haas.)

Q. Did you see him work on the engines of the Coastal Glacier?      A. No. I never did.

Q. Do you know whether or not he maintained the engines of the Coastal Glacier and kept them in good running order and [16] good condition?

A. I know they were in good running condition.

Q. You are not a diesel engineer yourself?

A. No, sir.

Q. And you are not a marine engineer?

A. No.

Q. And since Mr. Long's death, who has attended to the engineering and maintenance of the Coastal Glacier?      A. John Nitson.

Q. Who is he?

A. He is a chief engineer.

Q. And how frequently does Mr. Nitson visit the Coastal Glacier for the purpose of overhauling and maintaining the Coastal Glacier?

A. He turns over the large engines on there to keep them in working condition about once a month.

Q. Now where did you say the light came from on the Coastal Glacier?

A. They come from batteries.

Q. And from what motors, main or auxiliaries?

A. Auxiliaries.

Q. Do you know what duties Mr. Long had in connection with maintaining the auxiliary motors?

A. Do I know what?

Q. Do you know what work Mr. Long engaged in, in maintaining the auxiliary motors? [17]

A. I know that he had to run them every day.

(Testimony of Harlan C. Haas.)

Q. And in addition to that, you say the generator was run every day?

A. That's right.

Q. Do you know at the time of Mr. Long's death whether the Coastal Glacier was kept up so that she, if she had a charter or trip, she could immediately be put in service?

A. Yes, sir. She was ready to go any time.

Q. Mr. Haas, referring to this conversation—and I am not waiving my objection to competency but only in the event it is held competent—I will ask you if Mr. Long told you where he was going at the time of his alleged accident?

A. He was going to Minnesota.

Q. No. You said that he slipped on a portion of the Coastal Glacier.

A. Oh, yes; he had slipped.

Q. And what stairway had he slipped on?

A. He didn't tell me exactly where he slipped.

Q. Did he tell you whether it was on the vessel or up town some place?

A. He told me he slipped going into the engine-room.

Q. Did he tell you why he was going into the engineroom?      A. No, he didn't.

Q. Would you tell us, Mr. Haas, the approximate length of the Coastal Glacier? [18]

A. One hundred fourteen feet.

Q. Could you give us her beam?

A. About thirty feet.

Q. And she is diesel powered?

(Testimony of Harlan C. Haas.)

A. By 2/20 horsepower diesel.

Q. And they require the services of a diesel engineer to operate? A. That's right.

Q. And you said Mr. Long was a diesel engineer? A. Yes.

Q. Since you have been employed on the Coastal Glacier since 1948, has that vessel put to sea for various trips from time to time?

Mr. Vance: I am objecting to that. I think it is immaterial what trips the boat made. I don't think it is definite.

Mr. Franklin: I think it goes into the general picture that the vessel was ready and willing to sail when chartered or was available.

Deputy Commissioner: I think I will allow the question.

A. It was ready to go because it went out in September after I took over.

Q. (By Mr. Franklin): And has gone out since?

A. And has gone out since. [19]

Redirect Examination

By Mr. Vance:

Q. Are your duties confined to the Coastal Glacier? A. Both boats.

Q. And what about Mr. Long's duties?

A. Same thing.

Q. Are there two different things you run, generators and auxiliaries? A. That is all one.

Q. And you run them every day?

A. Run them every day.

(Testimony of Harlan C. Haas.)

Q. What kind of a motor is that?

A. It is a diesel engine; about like on an automobile, self-starter, an electric starter.

Q. How did you learn to operate that?

A. Mr. Norton Clapp showed me how.

Q. And the sole purpose of that is to keep up the electricity?

A. That keeps up the electricity.

Q. Would you say the boat went out in September of 1948?           A. Yes, in '48.

Q. When she went out on that occasion did you go with her?           A. No, I didn't.

Mr. Vance: I think that is all. [20]

### Recross-Examination

By Mr. Franklin:

Just one last question.

Q. Mr. Haas, I believe you testified you did not attempt to maintain or keep the engines in repair like Mr. Long did.           A. No.

Mr. Vance: I object to that. There is no evidence to that effect.

Q. (By Mr. Franklin): When Mr. Long was aboard the vessel, who kept the engines in repair?

A. I judged Mr. Long did.

Q. When you took over, it was necessary to employ a chief engineer for that job?

A. Yes.

Q. Because you are not a chief engineer?

A. No, I am not.

(Testimony of Harlan C. Haas.)

Redirect Examination

By Mr. Vance:

Q. What does Mr. Nitson do?

A. He is a chief engineer and does whatever is to be done.

Q. How often?

A. Supposed to be there once a month.

Q. What does he do there?

A. He looks over and checks over all machinery. If I run into trouble he fixes it.

Q. (By Mr. O'Leary): What is your salary by the week or month? [21]

A. By the month \$250.00.

Q. Do you sleep on board the Coastal Glacier?

A. Yes, sir.

(Witness excused.)

ALLEN H. LINK

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Deputy Commissioner: State your full name and home address?

A. Allen H. Link; home address is 7208 Interlaaken Drive, Tacoma, Washington.

Direct Examination

By Mr. Vance:

Q. Mr. Link, do you have any relation to the Coastal Navigation Company?

(Testimony of Allen H. Link.)

A. Yes. I am Secretary and Treasurer of the Coastal Navigation Company, and also Director.

Q. And what vessels, if any, do the Coastal Navigation Company own?

A. Coastal Forest and Coastal Glacier.

Q. When were they acquired by the Company?

A. I believe it was early in 1946. That is my recollection.

Q. What kind of vessels are those?

A. They were originally built for war purposes and, as I gathered, they were called FS's. To my knowledge they were [22] two types of FS vessels built in Bellingham for the Army or Navy, I forget which, one 115 feet long and another I believe 140 and they were built specifically for use in Alaska ports and waters. They had a special draft and special build that enabled them to do a good job in Alaskan waters.

Q. When these two vessels, Coastal Glacier and Coastal Forest, were acquired by the Company, what was the intent of the Company as to the use of those vessels?

A. We bought these two vessels at a surplus sale up in Seward and it was our intention to have those vessels augment to some extent our Alaska Transportation Company service to Alaska in that we would be able to haul freight and passengers with these 115 foot vessels into our own and other ports in South Eastern Alaska. So when we purchased them we brought them down to Ketchikan and put them in the yards there and more or less

(Testimony of Allen H. Link.)

reconverted the vessels into combination passenger and freight vessels to put them into this operation of port to port call.

Q. Were they ever used for that purpose?

A. Only the Coastal Glacier. The Coastal Forest was ready but she never made a trip.

Q. How many trips did the Coastal Glacier make? A. Just one.

Q. When?

A. I think it was in '46; along the latter part of '46. [23] I think that is my recollection of it.

Q. Why was it not used after that for that purpose?

A. We had spent a good deal on the vessels, around \$25,000.00, I think it was on each one of the vessels, in reconverting them, setting up our docks and our schedules and that sort of thing, predicated on a crew which was hired not entirely out of Ketchikan but Ketchikan or Juneau or both of them. Our Alaska Transportation agents at that time, Mr. Culbert in Ketchikan and Mr. George in Juneau, hired the crews for both the Forest and the Glacier.

Q. May I interrupt at that point? What was hired in the nature of a crew at that time? What did it consist of?

A. It consisted of a master and chief mate and, I presume, second mate. I can't say as to that. Sailors—I think there were four or five sailors, and



(Testimony of Allen H. Link.)

a cook, assistant, and chief engineer and assistant engineer. I think the total crew at that time consisted on each vessel of somewhere in the vicinity of about nine or ten; that is my recollection, approximately nine or ten. We made this one trip which would be approximately a week's duration and when we got back into our home port one of the Unions decided that our crew complement was definitely too low and that we would have to increase our crew complement, as I recall it, to thirteen, and by figuring out in dollars and cents the requirement they were going to make us comply with and with the additional complement, and [24] I believe there were some additional salaries to be paid, and we felt we could not make the vessel pay for itself on the projected trips and we tied the vessels up and they were tied up outside of Ketchikan, I believe, until somewhere in March of 1947.

Mr. Franklin: Do you want to refresh your recollection by these log books?

A. (Continuing): So we were never able to get any change in the complement of the crew or other arrangements, which they didn't think were satisfactory, so we decided to bring the vessels down to Seattle, which was done in March, 1947, and see whether or not we could do anything along the line of chartering these vessels as yachts or fishing or any other purpose of a charter. So we moved them down and got in touch with an attorney in the Hoge Building, and he owned this Ballinger Dock and we made arrangements with him to tie up our two vessels there.

(Testimony of Allen H. Link.)

Q. (By Mr. Vance): And they have been tied up there until this time? A. Yes, sir.

Q. What happened to the crew that brought the vessels down from Ward Cove?

A. All of the crew of both vessels that brought them down from Ward Cove were discharged in a day or two, or two or three, after the time it took to clean the vessels up and [25] after that Mr. Long, Chief Engineer of the Coastal Glacier, was retained in that capacity from that point on until he passed away. He was the only member of the crew that was retained.

Q. Of both vessels. A. Yes, sir.

Q. Mr. Link, can you tell me approximately how many, if any, trips the Coastal Forest made from March, 1947, until the death of Mr. Long?

A. The Coastal Forest to my knowledge did not make any outside trips at all and when I say "outside" I mean just outside the Lake.

Q. Do you know how many trips, if any, the Coastal Glacier made between March, 1947, and Mr. Long's death?

A. Yes, I think I can tell you that. That was March of '47 that she came down from Ketchikan and she went out in May of '47.

Q. You have some notes there. As we go along maybe you can tell us where she went?

A. There was a scout set-up, and he is one of the officers and I think they were having some kind of a convention here and he took out as I recall it forty or fifty boy scouts taken out on a trip. With-

(Testimony of Allen H. Link.)

out referring to each individual the log will tell the exact time. In August and September, 1947, there was a fishing trip made to Cape Flattery, in that [26] general vicinity.

Q. Cape Flattery is a point just off the Northwest tip of the State here?

A. Yes. June 27, 1947, there was a party taken to the Crew Race, University of Washington Crew Race.

Q. That was just in the Lake?

A. Just in the Lake and in September, 1947, there was a fishing trip made to Campbell River in British Columbia. In August, 1948, it was taken out only for compass adjustment, oil and fuel and minor adjustments to the automatic pilot.

Q. There were no trips between the fishing trip to Campbell River and the time it was taken out for compass adjustment?

A. No. In September '48, it again made a trip to Campbell River.

Q. Now, when this boat went out on these fishing trips, who sailed on her as crew?

A. As far as the crew was concerned—did you say since March '47?

Q. Yes.

A. The trip in May, which was the Boy Scout trip, Mr. Nitson acted as Chief Engineer and we had a cook and helper and he would have some of his friends act as helpers or sailors or whatever you want to call it. There was no actual member of the crew hired to do that other than the cook and chief [27] engineer.

(Testimony of Allen H. Link.)

Q. Mr. Clapp and his friends would act as Master, Mate, and so forth?

A. Yes. Other than the engineer and cook there was no official crew members.

Q. Did Mr. Clapp go on these trips?

A. Yes.

Q. And when he sailed, he sailed as master?

A. Yes, sir.

Q. These fishing trips in August and September 1947, to Cape Flattery and Campbell River, you say Mr. Clapp went on those trips?

A. They were primarily pleasure trips, if that is what you are getting at, yes.

Q. Yes. Mr. Clapp is the principal stockholder?

A. Yes.

Q. Did Mr. Long sail with the boat on those occasions?

A. Mr. Nitson worked on the trip of May '47 and without checking Mr. Long's period, he took some vacations, I believe he was gone, so we hired Mr. Nitson. On the August and September trips Mr. Long was Chief Engineer. Again in June '47, Mr. Nitson was the Chief Engineer on that trip and whether Mr. Long was there I could not tell you, but Mr. Nitson went. In September '47, Mr. Long went.

Q. Mr. Long was custodian of both the vessels, was he not? [28]

A. Yes, sir.

Q. He had the duty of keeping watch and keeping trespassers off?

A. In additon to his duties. His other duties

(Testimony of Allen H. Link.)

are primarily taking care of the boats. We have a cyclone fence all around the property and his major duties are to keep watch.

Q. And to keep the vessels clean?

A. Yes, sir.

Q. And to keep them oiled? A. Yes, sir.

Q. And to report any major difficulties, I suppose, for repair? A. Yes, sir.

Q. Was Mr. Long a member of the Marine Engineers' Union?

A. I could not tell you that. I don't know.

Q. When the vessel was up in Ward's Cove, did she have a crew aboard?

A. There was a skeleton crew aboard of some nature at Ward's Cove. I would have to check the records but there was a skeleton crew of some nature aboard, because I know Mr. Long was one of them and I think there were probably on each, two or three on each vessel. That would be my guess at the time they were tied up.

Q. The Coastal Forest is in operating condition, is it? A. Yes, sir. [29]

Mr. Vance: I think that is all.

### Cross-Examination

By Mr. Franklin:

Q. Mr. Link, the Coastal Glacier is a documented vessel? A. Yes.

Q. With the Customs, a department of the United States Government? A. Yes.

(Testimony of Allen H. Link.)

Q. And Mr. Long you say first joined the Coastal Glacier as Chief Engineer when?

A. On August, 1946.

Q. And had he remained attached to the vessel up until the time of his death?

A. Yes, up until the period he wanted to get off for vacation.

Q. Did he make several trips away from the vessel? A. Yes.

Q. Where did he live?

A. He lived aboard the Coastal Glacier or Forest but I think he was on the Coastal Glacier.

Q. He was paid a flat salary of \$250.00 a month?

A. Yes, sir.

Q. And in addition did he receive subsistence?

A. Yes, sir, by Coastal Navigation Company.

Q. Was he ever paid an hourly wage? [30]

A. No, sir.

Q. What was your purpose of continuing Mr. Long aboard the Coastal Glacier after the vessel returned from Alaska to the port of Lake Washington in March 23, 1947?

A. That was the Coastal Navigation's idea. At the time, we would see if there would be any possibility of disposing of the Coastal Forest. We had in our mind that we would like to dispose of the Coastal Forest. Besides that, we spent a good deal of Mr. Swanson's time; he is the manager of the Alaska Transportation Company, on the basis of chartering either boat and therefore we wanted to keep them up and ready to go at one day's notice.

(Testimony of Allen H. Link.)

Q. For that purpose was it necessary for a man who had the experience and rating of a Chief Engineer to be placed aboard the Coastal Glacier?

A. As far as our own operation and as far as Mr. Clapp's own personal use of the Coastal Glacier or Forest is concerned, we would not take out that vessel without an engineer aboard.

Q. Let me ask you this: Why is it you retained Mr. Long aboard the vessel, when the vessel reached Seattle, and did not get just any ordinary individual that you find around Kirkland?

A. With a vessel's valuation somewhere around forty or forty-five thousand dollars, you can't let a piece of equipment and machinery lie idle. We had to have a man capable of overhauling and handling the mechanical and other parts of the [31] vessel to keep it up.

Q. Did you feel that Mr. Long was capable of doing that kind of work you mention?

A. Yes.

Q. Now, Mr. Link, during the period from March 23, 1947, until Mr. Long's death on May 8, 1948, what effort was the Coastal Navigation Company making to put the Coastal Glacier in service during that period?

A. We have quite a file built up on the basis, one of the basis, of chartering the Coastal Glacier.

Q. Were you endeavoring during that period to obtain satisfactory charters for the vessel?

A. Yes.

Q. And what would have happened to the vessel?

(Testimony of Allen H. Link.)

A. We would have chartered her and I might also add the one basic requirement in chartering the vessel was we would be able to name our own engineer aboard, thinking entirely of the mechanical operation of the vessel.

Q. And if you had been successful in obtaining a charter during that period, who would you have named as engineer?

Mr. Vance: I object to any further inquiry along that specific line.

Mr. Franklin: I think it is competent to show the status of Mr. Long.

Mr. Vance: I think the testimony is specific, [32] particularly with reference to the officials of the Company.

Mr. O'Leary: I am desirous to get all the facts in connection with the case and therefore will allow the question.

A. I think I am a little confused. What was the question?

Q. (By Mr. Franklin): Had you obtained a charter during this period, who would you have named as engineer of the Coastal Glacier?

A. Mr. Long. That was the only requirement in submitting a charter.

Q. Mr. Link, since Mr. Long's death what has the Company found necessary in order to maintain the engines and equipment of the Coastal Glacier?

A. We have had to hire Mr. Nitson. I think he was our Port Engineer and he is available to us for any mechanical duties on an hourly basis and



(Testimony of Allen H. Link.)

he takes care of them, and, as a matter of fact, two weeks ago he did some work and does at regular intervals and goes over the vessel, turns over the main engines to keep them in good shape.

Q. Is Mr. Haas able to do those things?

A. No. He is hired as a caretaker; not as a mechanical man.

Q. Is he able to do those things?

A. Not as a mechanical man.

Mr. Franklin: That's all. [33]

### Redirect Examination

By Mr. Vance:

Q. You say Mr. Long was paid \$250.00 a month?

A. Yes.

Q. Haas was paid the same?

A. \$250.00 a month. He has his living quarters aboard.

Q. Did Mr. Long have living quarters aboard the vessel? A. Yes.

Q. He cooked aboard the vessel?

A. We paid for the groceries and he cooked aboard.

Q. You paid for the groceries? A. Yes.

Q. Mr. Link, you say you have been in the transportation business for sometime?

A. I am really not a transportation man, sir, but I have been connected with Mr. Clapp, and I would not want to call it a transportation man because I am not.

(Testimony of Allen H. Link.)

Q. Well, there are moorages, personally operated, where you can moor vessels like these and have them looked after and cared for?

A. Yes, sir.

Q. Does the Company ever investigate the possibility of putting these vessels into such a moorage as that?      A. Yes, sir.

Q. But it is more economical to have those vessels—— [34]

A. Not more economical but we thought it was the best thing to do.

Q. Now, Mr. Long looked after the mechanical condition of both vessels, did he, the Coastal Glacier and the Coastal Forest?      A. Yes, sir.

Q. Had Mr. Long been employed by your Company prior to his service on the Glacier?

A. No, sir. He was hired in Alaska.

Q. The Coastal Navigation Company did not purchase any other vessel?      A. No, sir.

Q. Neither of these vessels has ever been decommissioned?

Mr. Franklin: What do you mean by decommissioned?

Mr. Vance: Perhaps to clarify it——

Witness: Maybe I could answer that.

At the time the vessels were brought down from Ketchikan they of course were registered or documented to take care of combination passenger and freight vessels. At the time we brought them down here, for tax purposes, we documented or registered them as yachts.

Q. (By Mr. Vance): So far as you are able to

(Testimony of Allen H. Link.)

determine, of your own knowledge, all the laws have been complied with by the Company so that it was legal at all times to operate the vessels [35] at all times?      A. Yes, sir.

Q. Since they were brought from Alaska there has never been a time when you did not comply with the laws so that it would be legal to operate the vessels?

A. No, there has never been a time.

Mr. Vance: That's all.

Mr. Franklin: That's all.

Deputy Commissioner: I am curious to learn why Mr. Long was furnished subsistence, whereas Mr. Haas was not furnished subsistence. Could you give any reason for that?

A. The only reason I know of—I did not hire Mr. Haas. There are two or three memorandums in the file here from Mr. Clapp—to try to locate another man of Mr. Long's ability to take over the job after he had passed away; and we were unsuccessful in locating a man, who had that engineering ability and still would like to live aboard the vessel seven days a week, and stay there, so that we hired the next best we could and without the engineering ability and possibly because of that lack, maybe the arrangements of not furnishing subsistence, maybe that was the reason for it. Haas was hired, as I remember it, on a basis of \$250.00 a month and his living quarters on the boat. The matter of the other items was not discussed. That is the best way I can answer it. [36]

(Testimony of Allen H. Link.)

Q. (By Mr. Vance): Did I understand you to say the differential was because Mr. Long was Chief Engineer and could perform those duties?

A. That is the deduction; that is only a deduction on my part, that it would be the only reason for the difference in the pay, or the amount he would have net to him.

(Witness excused.) [37-A]

Mr. Vance: That is the claimant's case.

Mr. Franklin: Carrier and employer would like to offer a certified copy of death certificate of the decedent.

Mr. Vance: No objection.

Deputy Commissioner: Official copy of the death certificate, filed in connection with the death of Francis Louis Long, will be received in evidence and marked Carrier's Exhibit 1.

DEPARTMENT OF PUBLIC HEALTH

OFFICE OF THE DIRECTOR OF PUBLIC HEALTH  
AND REGISTRAR OF VITAL STATISTICS

**CERTIFIED COPY OF DEATH CERTIFICATE**

PLACE OF DEATH

County of King.  
City of Seattle

Volume No. 1948

2016

Register No. \_\_\_\_\_

1. PLACE OF DEATH: **King**  
(a) County  
(b) City or town **Seattle**  
(c) Name of hospital or institution:  
**U. S. Marine Hospital, Seattle, Wash.**  
(d) Length of stay: In hospital or institution **3 days**  
(Specify whether  
In this community (Years, months or days) **1 year**

2. USUAL RESIDENCE OF DECEASED:  
(a) State **Minnesota** (b) County \_\_\_\_\_  
(c) City or town **Park Rapids**  
(If outside city or town limits, write RURAL)  
(d) Street No. \_\_\_\_\_  
(If rural give location)  
(e) If foreign born, how long in U. S. A. ? \_\_\_\_\_ years

3. (a) FULL NAME **FRANK LOUIS LONG**

3. (b) Was decedent ever a member of the Army, Navy or Marine Corps of the United States? \_\_\_\_\_  
Name of organization in which such service was rendered \_\_\_\_\_  
Rank \_\_\_\_\_ Period of service \_\_\_\_\_

4. Sex **male** 5. Color or race **white** 6(a) Single, widowed, married, divorced **married**

6. (b) Name of husband or wife **Genevieve M. Thompson** 6(c) Age of husband or wife if alive \_\_\_\_\_ years

7. Birth date of deceased **Oct. 22, 1885**  
(Month) (Day) (Year)

8. AGE: Years **62** Months **6** Days **15** If less than one day \_\_\_\_\_ hr. \_\_\_\_\_ min.

9. Birthplace **Greely, Iowa**  
(City, town or county) (State or foreign country)

10. Usual occupation **Chief Engineer**

11. Industry or business **Shipping**

12. Name **Simon L. Long**

13. Birthplace **Germany**  
(City, town, or county) (State or foreign country)

14. Maiden name **Marion Sutter**

15. Birthplace **Iowa**  
(City, town, or county) (State or foreign country)

16. (a) Informant's own signature **Hospital Records**

(b) Address **U. S. Marine Hospital, Seattle**

17. (a) **Removal** (b) Date thereof **5/8/48**  
(Burial, cremation, or removal) (Month) (Day) (Year)

(c) Place: burial or cremation **Spirit Lake, Iowa**

**Columbia Funeral Home**

18. (a) Signature of funeral director **W. F. Lewis**

(b) Address **Seattle, Wash.**

19. (a) **May 8, 1948** (b) **Emil E. Palmquist**  
(Date received local registrar) (Registrar's signature)

3. (c) Social Security Number \_\_\_\_\_

**MEDICAL CERTIFICATION**

20. Date of death: Month **May** day **7**  
year **1948** hour **10:20** minute **P.M.**

21. I hereby certify that I attended the deceased from **May 4**, 19**48**, to **May 7**, 19**48**  
that I last saw him alive on **May 7**, 19**48**  
and that death occurred on the date and hour stated above.

Immediate cause of death **Acute dilatation of stomach and intestine**

Due to **Strangulated inguinal hernia**

Due to \_\_\_\_\_

Other conditions: **atelectasis and pulmonary edema**  
(Include pregnancy within 3 months of death)

Major findings: **Strangulated hernia**

Of operations **same as above**

Of autopsy \_\_\_\_\_

22. If death was due to external causes, fill in the following:

(a) Accident, suicide, or homicide (specify) \_\_\_\_\_

(b) Date of occurrence \_\_\_\_\_

(c) Where did injury occur? \_\_\_\_\_

(d) Did injury occur in or about home, on farm, in industrial place, in public place? \_\_\_\_\_

While at work? \_\_\_\_\_ (Specify type of place)

Signature **G. E. Tooley** (M. D. or other) **M.D.**

Address **U. S. Marine Hosp.** Date signed **5/8/48**

I HEREBY CERTIFY, That the foregoing is a true, full and correct copy of the certificate of death of

FRANK LOUIS LONG

on file in this office.

*Emil E. Palmquist, R.D.*  
Registrar, City of Seattle.

By *W. F. Lewis*  
Seattle, Wash. Aug. 3, 1948

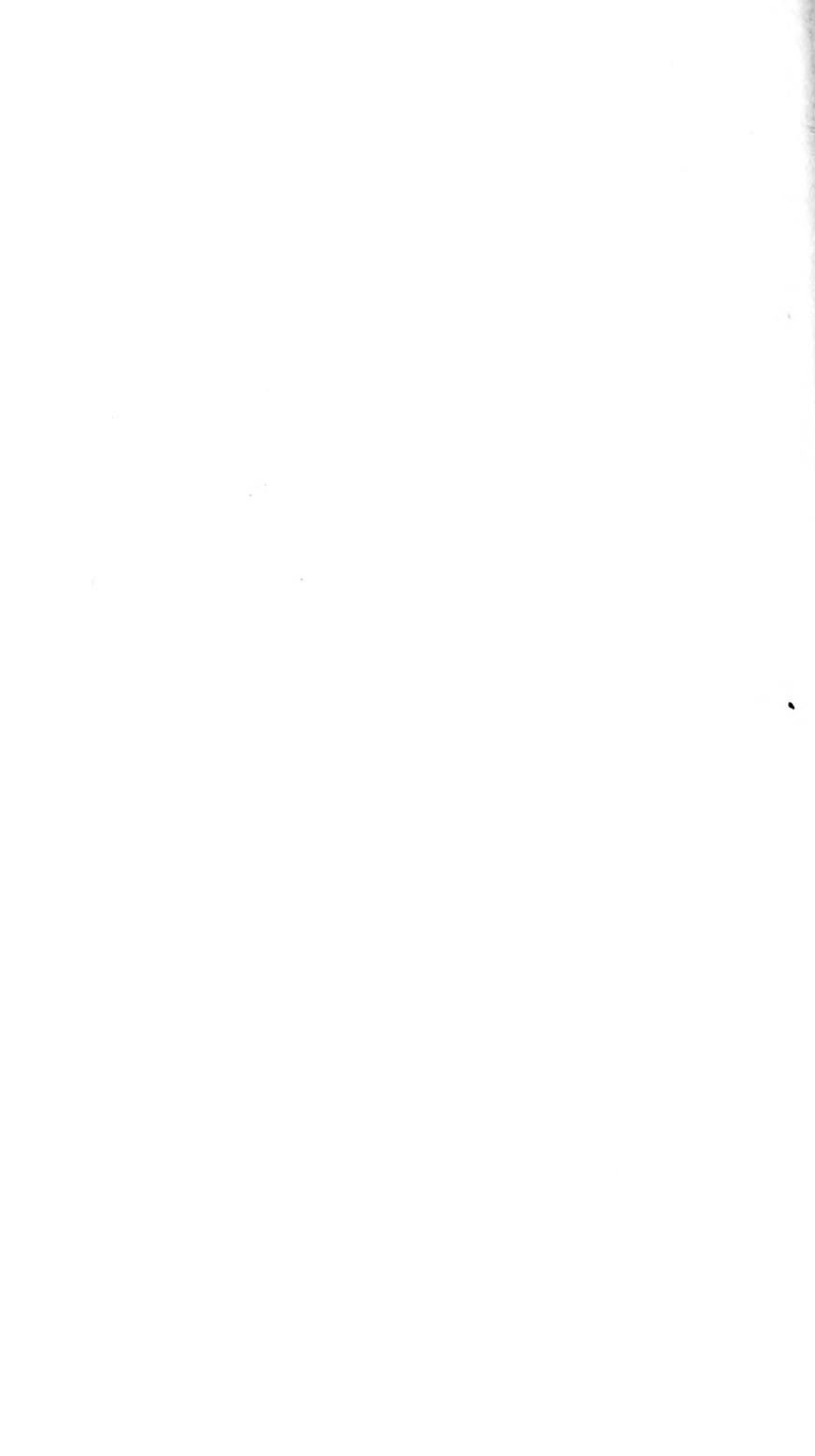


(Testimony of Allen H. Link.)

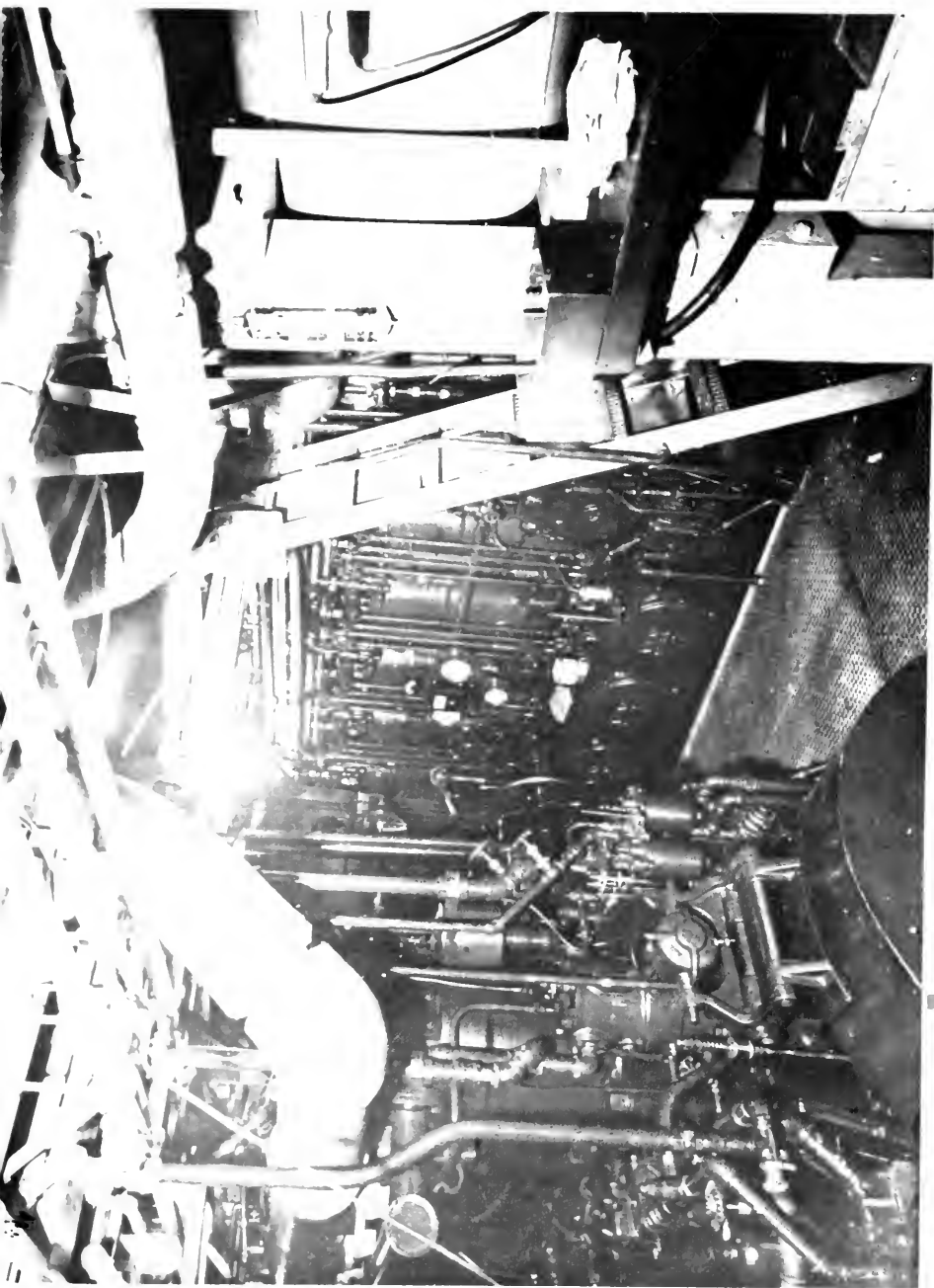
Mr. Franklin: Carrier would like to introduce in evidence two photographs showing the engine-room of the "Coastal Glacier," which were taken August 3, 1948. May we mark both of these as one exhibit?

Mr. Vance: No objection.

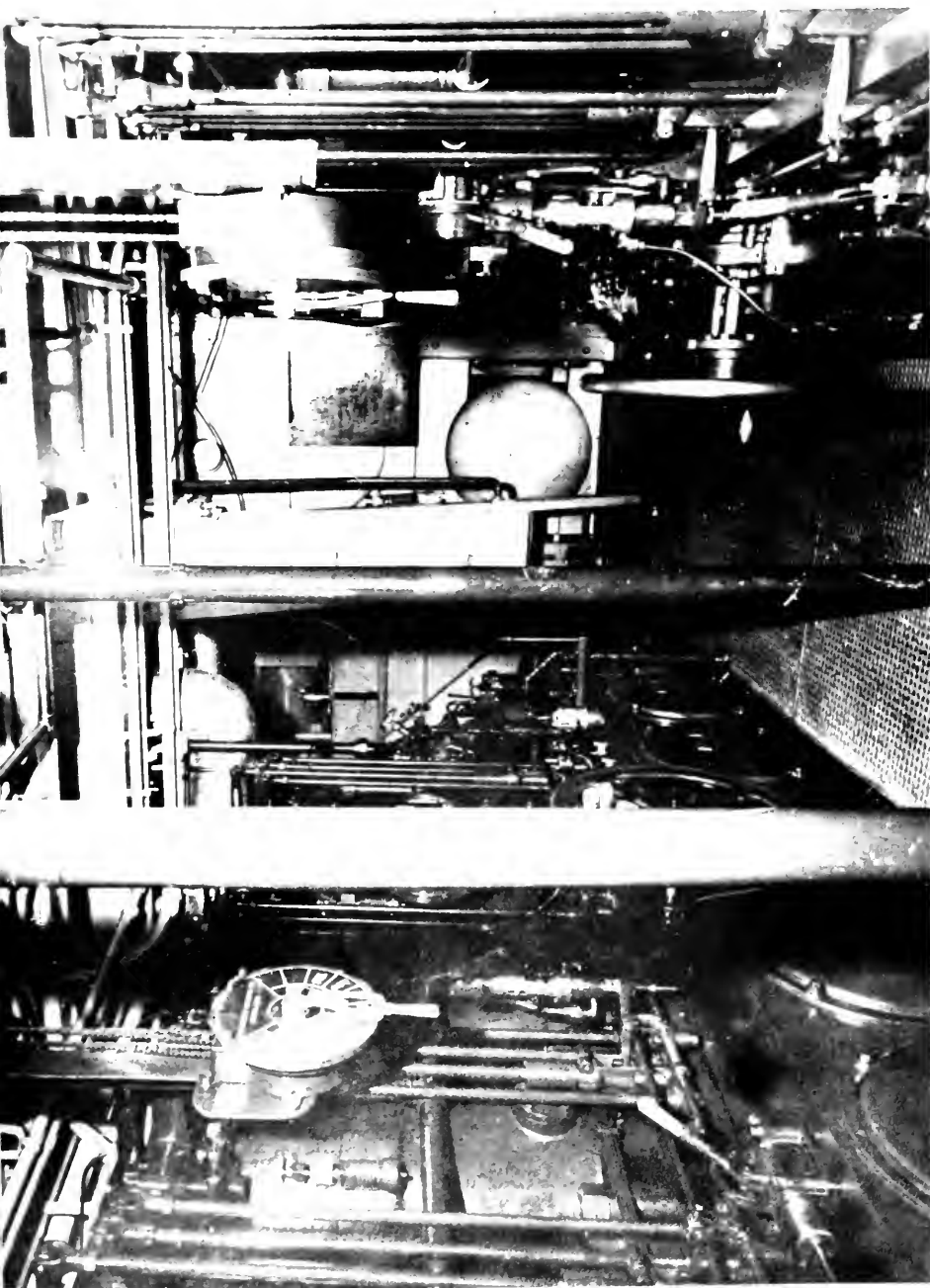
Deputy Commissioner: The two photographs just referred to will be received in evidence and will be marked Carrier's Exhibits 2 and 3.













Mr. Franklin: Carrier rests.

Mr. Vance: I have a memorandum, Mr. O'Leary, I would like to hand you at this time. I wonder if it would expedite matters if we read into the record the clinical portion of the record that would concern it?

Deputy Commissioner: I think that might be the best way to handle the record of the U. S. Marine Hospital; so if you will be good enough to read that portion, you may do so. [37-B]

Mr. Vance: I am reading from clinical record, Claimant's Exhibit 1, as follows:

"U. S. Marine Hospital, Seattle, Wash. Register No. 51-020. Surname of patient: Long, Frank Louis; Class of beneficiary A. S. Occupation: Chief Engineer; Permanent address: Park Rapids, Minnesota. Name of nearest relative or friend: Genevive M. Long. Address of nearest relative or friend: Same. Age of patient: 63. Date of birth: 22 Oct., 1885. Sex: Male. Race: White. Nativity: Greely, Iowa. Religion: Prot. Length of time in this city: 1 year. Legal residence: Minnesota. Marital state: Married. Husband (or wife) Genevieve M. Thompson. Father's name: Simon L. Long. Mother's maiden name: Marion Sutter. Father's birthplace: Germany. Mother's birthplace: Iowa. Source: S.S. Coastal Glacier. Date of last service: Oct. 1945 to 5-4-48. Authority: Par. 32.14. Date and hour admitted: 9:45 p.m.—4 May '48. Condition on arrival: Wheel-chair. Arrived by ambulance. Bilateral hernia

Rt. incarcerated hernia. Ward assigned: 6.

“L. MEADE, Med. Int.,  
Admitting Officer.

“Diagnosis: 650-514 strangulation of ileum due to hernia. 650.415.8 Ilens, paralytic, following operation. 640-415.6 Dilatation, acute, of stomach. 0601-639.3 Hernia, inherent, right. Date of diagnosis 5/4/48.”

Mr. Vance: Then there are some notes here [38] which are immaterial. (Continuing to quote.)

“Signed T. S. McGowan, Surgeon.

“Disposition: Expired 10:20 p.m. Condition on Disposition: Expired. Date of disposition: 5/7/8. Autopsy: Yes. (Signed) Geo. Cooper, Ward Surgeon.”

Mr. Vance: I am omitting page 2 and reading from page 3:

“History of Present Disease:

“Chief Complaint (in patient's own words): (1)-Acute abdominal pain; (2) Vomiting—severe, unable to retain water; (3) Absolute constipation.

“Probable cause, date, and mode of onset of disease. Date and cause of injury. Evolution and course of admission. Subjective symptoms:—

“Patient enters hospital with history of slipping on the deck and wrenching himself with immediate severe pain in the right lower quan-

drant. Patient also became aware of a mass in this region. The abdominal pain was severe with attacks of violent colic. The patient began to vomit and was unable to retain even water. The onset of this episode was 5-2-48. Patient reached U. S. Marine Hospital on 5-4-48 with the symptoms becoming progressively more severe.

Surname of patient: Long, Frank L.—MS  
51-020 (Reg. No.)

“/s/ J.F. LOWNEY, M.F.

“Surgeon.”

Mr. Vance: I am omitting from page 4 and page 5 and page 6 and am reading from page 7: [39]

“Ward Surgeon’s Progress and Treatment Record.

“Ward surgeon will record on this sheet the diet, treatment, complications, changes of diagnosis, intercurrent diseases, and daily progress of the case, and will initial each notation.”

Mr. Vance: On the lefthand side of the page is a column for the date, 5/4/48; under “Treatment” and “Daily Notes” the following:

“Pt. slipped and fell but checked his fall with right hand and developed a rt. inguinal strangulated hernia. He has not been able to pass B.M.’s or gas since the accident. He vomits everything he eats—6-8 times yesterday and same today.”

Mr. Vance: I am omitting the rest of that page. Omitting page 8, page 9, page 10, all being merely routine notes.

Mr. Franklin: I will stipulate the record will show he died under the operation.

Mr. Vance: No, I am afraid that would not do—— (Continuing.)

Page 11 is a typewritten document. (Quotes.)

“Discharge Summary—Date May 7, 1948:

“This 63-year-old merchant seaman was admitted May 4, 1948, complaining of acute abdominal pain, vomiting and constipation. He stated on admission that he slept”—and I [40] assume that to be a typographical error—— (Continuing.)

“on the deck of the ship, twisting himself, producing immediate pain in the right lower quadrant. He also became aware of a mass in this region. Abdominal pain seemed followed with attacks of violent colic. This had been present for two days prior to admission.”

Mr. Vance: There are three paragraphs following that.

“/s/ GEO. COOPER, SR.

“Ass't Surgeon.”

Mr. Vance: Omitting page 12, history of treatment, omitting page 13, omitting page 14, omitting page 15, urine examination; omitting page 16, urine examination; omitting page 17, which is a record of the operation of the hernia. Quoting page 18, Post-Mortem Record, but omitting the formal parts of the record:

“Final Diagnosis: Primary cause of death: Strangulation of a segment of upper ileum in a right inguinal hernia.



“Contributory Factors: (1) Extensive ileus of small bowel. (2) Acute dilatation of the stomach. (3) Marked elevation of the diaphragm due to abdominal distention. (4) Partial atelectasis, both lower lobes. (5) Pulmonary edema and congestion. (6) Aspiration of stomach contents. (7) Passive congestion of viscera.

“/s/ G. E. TOOLEY,

“Surgeon, U.S. Public Health  
Service.”

Mr. Vance: I am omitting pages 19 and 20, [41] which are clinical abstracts.

Mr. Franklin: The carrier and employer desires to introduce the following statement from the hospital record: Page 2: The occupation of decedent is merchant seaman. Page 4: “Patient is a well-nourished, 63-year-old merchant seaman.” Page 11: “Discharge summary: 63-year-old merchant seaman.” That is all the carrier desires to read from the hospital record.

Deputy Commissioner: At this point I would like to ask whether there is any question as to the status of the widow in this case.

Mr. Franklin: The carrier is not denying the fact that the deceased left a surviving widow, whom I believe is Genevieve Long.

Deputy Commissioner: Is there any question about the payment of burial expenses in this case? I note Mrs. Long claims burial expense of \$725.88 and that she paid the full amount of the burial expense. Any question on that point, Mr. Franklin?

Mr. Franklin: No question on that.

Deputy Commissioner: Does either side have anything further to offer at this time?

Mr. Vance: I have nothing further to offer on the record.

Mr. Franklin: I would like to have the [42] decision held up until I can submit a brief, if that is what you wish, Mr. O'Leary, because it will probably only be a week's time.

Deputy Commissioner: Counsel for claimant has submitted a memorandum and if you so desire, you may submit a brief and decision will be reserved until I have had time to consider all the facts in connection with this case.

Mr. Vance: I wonder if you would ask any questions of either counsel either on or off the record at this time?

Deputy Commissioner: No. I have no questions at this time. I think the record will speak for itself. Both sides rest?

Mr. Vance: Yes.

Mr. Franklin: Yes.

Deputy Commissioner: The hearing is concluded and decision is reserved.

(Whereupon the hearing, which convened at 9:30 a.m., adjourned at 11:15 a.m., April 27, 1950.) [43]

### Certificate

State of Washington,  
County of King—ss.

I, James Trail, do hereby certify that I am a

regularly qualified and acting Court Reporter in the State of Washington and that as such Reporter, I reported in shorthand the above-entitled cause, and that thereafter the case was transcribed by myself; that the within and foregoing is a true and correct transcript of the stenographic notes taken by me during the hearing in the above-entitled cause.

Dated this ninth day of May, 1950.

/s/ JAMES TRAIL.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 7, 1951.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the orders filed January 30, 1951, and February 15, 1951, and each thereof, to the United

States Court of Appeals at San Francisco, California, and are identified as follows:

1. Petition for injunction, filed June 28, 1950.
2. Praecipe for summons, filed June 28, 1950.
3. Marshal's Return on Summons, filed July 6, 1950.
4. Appearance of U. S. Attorney for defendant, filed July 19, 1950.
5. Defendant O'Leary's Motion to Dismiss Petition, filed 10/11/50.
6. Memorandum of Points and Authorities in support of Defendant O'Leary's Motion to Dismiss Complaint, filed Oct. 11, 1950.
7. Motion of United States to Dismiss, filed Dec. 21, 1950.
8. Plaintiff's Memorandum, filed Jan. 5, 1951.
9. Memorandum of Claimant in Support of Motion to Dismiss, filed Jan. 8, 1951.
10. Memorandum and Order denying Motion to Dismiss, filed January 30, 1951.
11. Motion of Genevieve Long to Intervene, filed Feb. 6, 1951.
12. Notice of Hearing Motion to Intervene, filed Feb. 6, 1951.
13. Order Granting Leave to Intervene, filed Feb. 6, 1951. (Intervenor's Exhibit 1 attached.)
14. Answer of Intervenor to Petition for Injunction, filed 2/6/51.
15. Motion of Intervenor to Remand for

Taking of Additional Testimony, filed Feb. 6, 1951.

16. Transcript of Testimony at hearing before J. J. O'Leary. Deputy Commissioner, filed Feb. 7, 1951.

17. Memorandum and Order, filed Feb. 15, 1951.

18. Unsigned Order Denying Motion for Dismissal and Granting Injunction, lodged Feb. 15, 1951.

19. Unsigned Findings of Fact and Conclusions of Law, Lodged 2/15/51.

20. Exceptions to Proposed Findings of Fact and Conclusion of Law and Decree, Filed Feb. 15, 1951.

21. Notice of Appeal of defendant, filed Mar. 23, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal \$5.00, and that this amount has not been paid to me for the reason that the appeal is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 26th day of April, 1951.

[Seal]

MILLARD P. THOMAS,  
Clerk.

By /s/ TRUMAN EGGER,  
Chief Deputy.

[Endorsed]: No. 12915. United States Court of Appeals for the Ninth Circuit. J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's & Harbor Workers' Compensation Act, Appellant, vs. Coastal Navigation Company, a corporation, Fireman's Fund Insurance Company, a corporation and Mrs. Genevieve Long, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 30, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 12915

J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, Under the Longshore-  
men's & Harbor Workers' Compensation Act.  
Appellant.

vs.

COASTAL NAVIGATION COMPANY, a Corpo-  
ration, and FIREMAN'S FUND INSUR-  
ANCE COMPANY, a Corporation,  
Appellees,

STATEMENT OF THE POINTS ON WHICH  
APPELLANT RELIES AND DESIGNA-  
TION OF THE PARTS OF THE RECORD  
NECESSARY FOR THE CONSIDERATION  
THEREOF

The trial court erred in holding that there was no evidence to support the finding of the Commissioner that the decedent was not a member of the crew of the vessel.

The entire record is necessary for the consideration of this appeal.

/s/ J. CHARLES DENNIS,  
United States Attorney.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

The defendant designates the entire record herein as being necessary to the appeal and requests that all parts thereof be prepared for transmittal to the Clerk of the Court of Appeals, and further requests that all original exhibits be transmitted to said Clerk of the Court of Appeals together with said record.

/s/ J. CHARLES DENNIS,  
United States Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 17, 1951, U. S. District Court.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of



Civil Procedure, I am transmitting herewith, supplemental to the record heretofore forwarded in this cause, as part of the record on appeal, the following original paper:

22. Designation of Defendant of Record on Appeal, filed May 17, 1951.

Witness my hand and official seal at Seattle, this 17th day of May, 1951.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ TRUMAN EGGER,  
Chief Deputy.



No. 12915

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

J. J. O'LEARY, Deputy Commisisoner, Fourteenth  
Compensation District, under the Longshoremen's Act  
*Appellant*

vs.

COASTAL NAVIGATION COMPANY, a corporation;  
FIREMEN'S FUND INSURANCE COMPANY, a  
corporation; and MRS. GENEVIEVE LONG,  
*Appellees*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE DAL M. LEMMON, *Judge*

---

**BRIEF FOR APPELLANT**

---

J. CHARLES DENNIS,  
*United States Attorney*  
*Attorney for Appellant*

WM. S. TYSON,  
*Solicitor*

WARD E. BOOTE,  
*Assistant Solicitor*

HERBERT P. MILLER,  
*Attorney, U. S. Department of Labor*  
*Of Counsel*

OFFICE AND POST OFFICE ADDRESS:  
1017 UNITED STATES COURT HOUSE  
SEATTLE 4, WASHINGTON



No. 12915

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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J. J. O'LEARY, Deputy Commisisoner, Fourteenth  
Compensation District, under the Longshoremen's Act  
*Appellant*

vs.

COASTAL NAVIGATION COMPANY, a corporation;  
FIREMEN'S FUND INSURANCE COMPANY, a  
corporation; and MRS. GENEVIEVE LONG,  
*Appellees*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE DAL M. LEMMON, *Judge*

---

**BRIEF FOR APPELLANT**

---

**JURISDICTIONAL STATEMENT**

This case arises upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, U.S. Code, Title 33, Chapter 18, Section 901 *et seq.*

Section 21(b) of the Longshoremen's Act, *supra*, provides:

"If not in accordance with law, a compensation

order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred \* \* \*."

Jurisdiction of this court upon appeal is invoked under Section 1291, Title 28, U. S. Code.

## STATEMENT OF THE CASE

On May 2, 1948, Frank Long, the deceased, while employed as a caretaker of the SS COASTAL GLACIER, sustained injuries (a strangulated hernia) from which he died on May 7, 1948. His widow filed claim for compensation with the appellant deputy commissioner under the provisions of the Longshoremen's Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A., Section 901 *et seq.* The employer and insurance carrier controverted the claim upon the ground that the deceased was a member of a crew and hence not covered by the Compensation Act, 33 U.S.C.A., Section 903 (a) (1), which excludes "a master or member of a crew." A second ground of objection raised was that the injury did not arise out of and in the course of employment.

The deputy commissioner heard the evidence of the parties and thereafter filed the compensation order complained of, in which he found that the de-

ceased was not a member of a crew and that he did sustain the injury in the course of his employment.

The employer and insurance carrier thereupon filed in the court below a proceeding for judicial review of said order pursuant to Section 21(b) of the Longshoremen's Act, 33 U.S.C.A., Section 921(b). The court below held that, although the deceased sustained an injury which arose out of and in the course of his employment, he was a member of a crew and therefore not within the coverage of the Longshoremen's Act. The said compensation order accordingly was set aside. (T. 14, 30)

The present appeal followed from the order or orders thus entered. (T. 39).

### QUESTION INVOLVED ON APPEAL

Was the evidence before the deputy commissioner such as to *compel* a finding that the deceased was a member of a crew?

### SPECIFICATION OF ERRORS

The court below erred in redetermining the question whether the deceased was a member of a crew, since there was substantial evidence in the record to support the deputy commissioner's finding that at the time of injury he was not a member of a crew but a caretaker.

## SUMMARY OF ARGUMENT

The question whether an employee is a member of a crew is one of fact. (This is so even where the facts are not in dispute if different inferences may be drawn by the trier of the fact. *C. F. Lytle Co. v. Whipple, Deputy Commissioner*, 156 F. (2d) 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, Deputy Commissioner*, 150 F. (2d) 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner*, 309 U.S. 251 (1940); *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, Deputy Commissioner*, 137 F. (2d) 926 (C.A. 9, 1943); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C.A. 3, 1940); *Henderson, Deputy Commissioner v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.A. 5, 1943); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner*, 175 F. (2d) 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson, Deputy Commissioner*, 168, F. (2d) 872 (C.A. 5, 1948).)

It is only where the facts permit of but one conclusion that the question whether in a particular case the employee is a member of a crew is withdrawn from the trier of the fact and decided as a matter

of law. In the instant case the deceased's work at the time of injury not only was not typically the work usually expected of or performed by a crew member but it was typically and essentially that of a caretaker. Since the deputy commissioner found in these circumstances that the deceased was not a member of a crew his finding in this respect should under the authorities have been left undisturbed.

## ARGUMENT

### I

THE EVIDENCE IN THE RECORD SUPPORTED THE FINDING THAT THE DECEASED WAS NOT A MEMBER OF A CREW WITHIN THE MEANING OF THE LONGSHOREMEN'S ACT.

#### (a) *The Findings*

The deputy commissioner in the compensation order complained of found the facts in part as follows:

"That on the 2nd day of May, 1948, the deceased above named was in the employ of the employer above named at Seattle, in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by Fireman's Fund In-

surance Company; that the deceased entered the employ of the employer during the latter part of 1946 as Chief Engineer aboard the vessel "COASTAL GLACIER" at Ketchikan, Alaska; that in March, 1947, after having made one voyage in Alaskan waters the said vessel was brought to Seattle, Washington, and tied up at Ballinger Dock on Lake Washington; that except for the deceased, *the crew of the vessel was then discharged*, but deceased remained with the vessel in the capacity of caretaker and acted as Chief Engineer whenever the vessel was on a voyage under charter; that his duties consisted of keeping the engines in running order, charging the batteries, general care and maintenance of the vessel and to keep trespassers from boarding the vessel; that during the time the vessel was tied up at Ballinger Dock it was kept in readiness to sail on one day's notice and was on several occasions engaged under charter for fishing trips and for other purposes; that the last trip made by the vessel prior to May 2, 1948 was during September 1947, and that subsequent to that time the vessel remained tied up at Ballinger Dock; that the deceased lived aboard the vessel, prepared his own meals and was furnished with subsistence by the employer; that on May 2, 1948 while the deceased was descending the stairway leading to the engine room, he slipped and fell, in consequence of which he suffered a right strangulated hernia; that the deceased was admitted to the U. S. Marine Hospital on May 4, 1948 and died in said hospital on May 7, 1948 following an operation for the repair of the strangulated hernia; \* \* \* that at the time of his injury the deceased was performing service for the employer in his capacity as a caretaker of the vessel COASTAL GLACIER and not as a member of the crew of said vessel; that the injury and death of the deceased arose out of and



in the course of his employment by the employer above named; \* \* \*,"

(b) *The Evidence*

*Betty Marion Krafve*, Medical Record Librarian at U. S. Marine Hospital, testified that she had custody of the clinical records of the hospital (T. 43) and that she brought the records pertaining to the illness and death of Francis L. Long (claimant's Exhibit 1, T. 79) identified as Register No. 51-020. These records show that the deceased arrived at the hospital by ambulance on May 4, 1948 with a condition of bilateral hernia, with strangulation of the ileum due to the hernia (T. 80); that the deceased gave the following history: that he slipped on the deck and wrenched himself, with immediate severe pain in the right lower quadrant and that he became aware of a mass in that region; that abdominal pain followed, with attacks of colic and vomiting; that the onset was May 2, 1948 and the symptoms became progressively worse (T. 80, 81). Said records further showed that the primary cause of death on May 7, 1948 was strangulation of the ileum in the right hernia (T. 82). The death certificate shows the same cause of death (T. 73).

*Harlan C. Haas*, testified as follows: That his occupation is that of caretaker for the Coastal Navi-

gation Company; that he takes care of the vessels COASTAL FOREST and COASTAL GLACIER and of the yard (T. 44); that he is a painter by trade and had never been a member of a crew; that he was approached by Mr. Long, the deceased, 2 or 3 days before the first of May 1948, to take care of the vessel during a projected trip to Minnesota which Long intended to take and was told that the job consisted of keeping the boat clean and charging the electricity (keeping up the batteries) (T. 46); that later he went to see Mr. Long at the latter's request; that Long was in his cabin and said that he had slipped and fallen when he went to the engine room of the COASTAL GLACIER (T. 47, 48); that Long seemed to be sick and did not feel good; that he obtained a doctor for Mr. Long at the latter's request; and took care of him until the ambulance came to take him to the hospital; that deceased's abdomen was swollen (T. 49, 50); then Haas stayed on at the boat and took over Long's duties; that the duties were to keep the COASTAL GLACIER and COASTAL FOREST clean (T. 51) and to keep trespassers off; *that he had no duties in connection with navigation of the boats*; that he had continued on duty to the present (T. 52); that he had been told by Long that Long was a Chief Engineer and had been with the COASTAL GLACIER for three years; that Long was

living on the COASTAL GLACIER when Haas first met him, and Long had told him he had to run auxiliaries which "charged electricity" (generated electricity) for the boats (T. 53); that since Mr. Long's death the engineering and maintenance of the COASTAL GLACIER have been attended to by John Nitson, a chief engineer who visits the COASTAL GLACIER once a month for the purpose of turning over the engines to keep them in working condition (T. 54); that both his duties and those of Mr. Long were on *both* boats; that a diesel engine (the so-called auxiliary engine) with an electric self-starter similar to that of an automobile is run every day for the sole purpose of keeping up the electricity (T. 57); that when Mr. Long was aboard the vessel the engines were kept in repair by Long, but when he, Haas, took over it was necessary to employ a chief engineer for that job; that Mr. Nitson, a chief engineer, looks over, checks and makes necessary repairs once a month (T. 57, 58); that he, Haas, is paid \$250 per month and sleeps on board the COASTAL GLACIER (T. 58).

*Allen H. Link*, testified as follows: That he is Secretary, Treasurer and Director of the Coastal Navigation Co., owner of the vessels COASTAL FOREST and COASTAL GLACIER, which were acquired early in 1946; that the vessels were originally built

for war purposes and were called FS's; that there were two types, one 115 feet long and one 140 feet long built specifically for use in Alaskan waters; that they were purchased at a surplus sale and were intended to augment the company's Alaska Transportation Company service to Alaska in hauling freight and passengers to their own and other ports in Southeastern Alaska; that the vessels were brought down to Ketchikan, put in the yards (T. 59) and reconverted into combination passenger and freight vessels to put them into operation; that the COASTAL GLACIER was used for that purpose on one trip in the latter part of 1946 but the COASTAL FOREST never made a trip (T. 60); that a crew was hired consisting of approximately 9 or 10 and one trip of about a week's duration was made; that on the return to home port a union decided that the crew complement was too low and required that it be increased, and the owners felt that with additional expense for wages, the vessel could not be made to pay for itself on the projected trips and the vessels were tied up outside of Ketchikan until sometime in March 1947; that since they could not effect any change in the complement of the crew or make other satisfactory arrangements, the vessels were brought to Seattle in March 1947 for the purpose of chartering them as yachts on fishing or any other purpose of a

charter and the two vessels were tied at Ballinger Dock where they have been tied until this time (T. 61); *that the crews that brought the vessels down were discharged in 2 or 3 days*, the time it took to clean the vessels up, after which Mr. Long, Chief Engineer of the COASTAL GLACIER, was retained in that capacity for both vessels from that point until his death, and he was the only member of the crew that was retained (T. 62).

The witness further testified that the COASTAL GLACIER made the following trips between March 1947 and Mr. Long's death: That in August and September 1947 there was a fishing trip to Cape Flattery, a point just off the northern tip of the State; on June 27, 1947 a party was taken to the University of Washington Crew Race which was just in the Lake; and in September 1947 there was a fishing trip to the Campbell River in British Columbia. In August 1948 (after the deceased's death) the ship was taken out only for compass adjustments, and in September 1948 it again made a trip to Campbell River. Mr. Clapp (the owner of the navigation company) and his friends would act as Master, Mate and so forth and other than the engineer and cook there were no official crew members; that Mr. Clapp is the principal stockholder and the fishing trips were

primarily pleasure trips; that on the August and September (1947) trips Mr. Long was the Chief Engineer and on the trips of May 1947 and June 1947 Mr. Nitson was the Chief Engineer and Mr. Long went on the September 1947 trip (T. 64); that Mr. Long was custodian of both vessels with the duties of taking care of the boats; *that his major duties were to keep watch, and to keep the vessels clean, to keep them oiled and to report any major difficulties* (T. 64, 65).

It is believed that the evidence above referred to supports the findings of the deputy commissioner to the effect that at the time of injury (May 1948) the deceased was performing service in the capacity of caretaker of the vessel and not as a member of the crew within the meaning of Section 3(a) of the Longshoremen's Act as that section has been construed by the courts.

The courts have on numerous occasions had before them proceedings for review under the Longshoremen's Act, involving the question of whether the injured employee was or was not a "master or member of a crew" within the meaning of the Longshoremen's Act. From these cases certain well defined principles for determination of the question have evolved.

In the case of *South Chicago Coal and Dock Co. et al v. Bassett, Deputy Commissioner*, 309 U.S. 251 (1940), the question was whether the employee who worked on a lighter or barge in the Calumet River and Harbor and Indiana River and Harbor and whose *primary duty was to facilitate the flow of coal from his boat to other boats — removing obstructions to the flow with a stick* — was a member of the crew. The employee traveled with the vessel and performed some additional tasks, such as *maintenance* work and *handling the ship's lines*. He performed no navigational duties. He was described as a “deck-hand” by the captain. The mere appellation “deck-hand” however was held to be not controlling. The court held that the question whether the employee was a member of a crew was *one of fact* and that, where there was evidence to support the deputy commissioner's finding that he was not a member of the crew, such finding was final and conclusive. The Supreme Court said:

“So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not ‘a member of a crew’ turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. Hence the Court of Appeals correct-

ly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial. We have so held with respect to the conclusiveness of the finding of the deputy commisisoner that an injury to an employee arose 'out of and in the course of the employment', *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 166; as to the finding of the dependency of a claimant for compensation, *L'Hote v. Crowell*, 286 U.S. 528, *The Admiral Peoples*, 295 U.S. 649, 653, 654; and as to the finding that the employee had committed suicide and hence that compensation was not payable, *Del Vecchio v. Bowers*, 296 U.S. 280, 287. In the *Del Vecchio* case the question was with respect to the application of the exception made by paragraph (b) of section 3 with respect to 'Coverage', and we see no reason for a different view as to the application of paragraph (a) (1) of the same section.

\* \* \*

" \* \* \* The question concerns his *actual duties*. These duties, as the Court of Appeals said, *did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker*. What the court considered as supporting the finding of the deputy commissioner was that the *primary duty* of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. *Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual*



*workers on the water.*' *Scheffler v. Moran Towing Co.*, 68 F. (2d) 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling." (Italics supplied)

In the case of *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C.A. 4, 1934), cert. den. 293 U.S. 581, a similar question was involved. There the court said:

"\* \* \* while Congress has not, in the act, definitely classified those persons who are entitled to receive the benefits under it, it is hard to conceive of one who would come more definitely within the meaning of the words 'harbor worker' than De Wald. His *main duties*, as found by the Deputy Commissioner, were the checking and supervising the loading and unloading of cargo from barges and keeping all records with regard to the cargo. Such work as he did in making fast lines at docks or alongside vessels and pumping water out of the barges was *incidental to his main employment*. He did not live upon the barge but went home every night.

\* \* \*

"It is to us reasonably clear that Congress intended to except from the benefits of the Longshoremen's Act only those *persons ordinarily and generally considered as seafaring men*, at least only those employed on board a vessel having a master and crew.

\* \* \*

"De Wald was not a member of the crew within the fair and common meaning of the words used in the excepting clause when we interpret the

clause as one intended to restrict rather than extend and when we consider the purposes and history of the legislation as well as the nature of his duties and the use of the barges upon which he was, from time to time, employed by the day."

In the case of *Pacific Employers Ins. Co. v. Pillsbury, Deputy Commissioner, and David E. Slawson*, 130 F. (2d) 21 (C.A. 9, 1942), this court stated that there was evidence to support the finding of the deputy commissioner to the effect that the employee was not a member of a crew. The court cited the case of *South Chicago Coal & Dock Co. v. Bassett, supra*, as authority for its statement that the determination of the question depends upon the employee's *primary* duties. The employee's duties in that case were stated to be as follows:

"The claimant, David E. Slawson, was employed at a monthly wage as a *deckhand* aboard the 'Crockett'. His work required that he live aboard boat for five days out of each week, and he could not depart from the boat without permission of the officer in charge. *During most of his working time he was storing sugar on the boat or assisting in the discharge of such cargo*, the boat being tied to a dock while such operations were carried on; and he helped to sweep up any sugar that spilled on the decks. *To a slight extent he handled the lines in tying and untying the vessel*, and also assisted in laying out and bringing in the cargo plank. He and others aboard were required to respond to lifeboat drill, and in the event of an emergency or failure of the steering apparatus, he could be called upon to

hold the wheel. Ordinarily, though, he slept while the boat was in motion. *When it was tied up and he was not otherwise engaged, he would do some painting and other maintenance work.* He had no duties to perform on shore, and all his orders were taken from the mate or the captain.

Slawson held a membership in the Deckhands' Union; had a 'Seaman's Certificate of Identification' and 'Certificate of Service', but did not have an able seaman's papers."

For other cases construing section 3 (a) (1) of the Longshoremen's Act, see *Schantz v. American Dredging Co.*, 138 F. (2d) 534 (C.C.A. 3, 1943); *Puget Sound Freight Lines, et al v. Marshall, Deputy Commissioner*, 125 F. (2d) 876 (C.C.A. 9, 1942); *Gulf Oil Corporation v. McManigal, Deputy Commissioner*, 49 F. Supp. 75; *Blaske et al v. Bassett, Deputy Commissioner of Emp. Comp. Comm., et al*, 35 F. Supp. 315 (Mo. 1940); *Harper v. Parker, Deputy Commissioner, et al*, 9 F. Supp. 744 (Md. 1935). Compare: *Hagens v. United Fruit Co.* 135 F. (2d) 842 (C.A. 2, 1943); *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F. (2d) 608 (U.S. App. D.C. 1942); *Braner v. Brooklyn Eastern Terminal*, 46 F. Supp. 302 (N.Y. 1942); *Gonzales v. Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366 (N.Y. 1942).

In the *Wm. Spencer & Son Corporation v. Lowe, Deputy Commissioner, et al*, 152 F. (2d) 847 (C.C.A. 2, 1945) cert. den. 66 S. Ct. 1012, it was held that a

"*lighter captain*" is not a *member of a crew* within the meaning of Sec. 3 (a) (1) of the Longshoremen's Act. There the employee had mixed duties, some pertaining to pumping the hold, handling the lines when docking or casting off and making minor repairs, but primarily relating to loading and unloading cargo by means of a winch or "hoister". See also *Lehigh Valley R. R. Co. v. Lowe, Deputy Commissioner*, 68 F. Supp. 753 (N.J. 1947) involving a "barge captain" who was held to be not a member of the crew.

It will be seen from the foregoing authorities that the courts have generally construed the term "master or member of a crew" in Section 3 (a) (1) as having application to seamen or sailors who make up a "ship's company"; that is, seafaring men who live aboard vessels and are engaged in navigation, sign ship's articles, and engage generally in seafaring pursuits. Such a construction is in keeping with the distinction which has always existed between seamen "at sea" and others employed on local harbor craft. *Scheffler v. Moran Towing and Transportation Co., Inc., et al*, 68 F. (2d) 11 (C.A. 2, 1933). It was these seamen who were intended to be excepted from the coverage of the Act because, although a petition signed by 5,000 of them desiring to be included was filed with the Judiciary Committee which was considering the bill which became the Longshoremen's

Act (see Report No. 1767, 69th Congress, 2nd Session, Vol. 68, Part 5, pages 5907-5909); their leader Andrew Furuseth persuaded Congress to have them excluded. The reason advanced for their exclusion was that they had "ancient rights" which were valuable and which they did not desire to surrender for the rights they would have under the Longshoremen's Act. The remedies enumerated were: (1) maintenance and cure; (2) suit under the Jones Act; and (3) suit in Admiralty based upon the unseaworthiness of the vessel. In the instant case apparently there would be no remedy under (1) and (3) above. Under number (1) *supra*, a seaman is entitled to wages to the end of the voyage: *The Osceola*, 189 U.S. 158; *The E. H. Russell*, 42 F. (2d) 568 (D.C. E.D. N.Y. 1930). But where the vessel is not upon a voyage, there could be no payment of wages until the end of the voyage. Moreover, the remedy of maintenance and cure belongs to the seaman and dies with him. The remedy under (3) *supra*, also would not be available to a person in claimant's status because an employee working on a vessel by the day in a harbor who has the alternative of assuming or not assuming a risk may not recover for an injury resulting from the risk which he chooses to assume. *Scheffler v. Moran Towing and Transportation Co.*, *supra*. Moreover, the injury in the instant case was

not due to the unseaworthiness of the vessel; and as a final reason, any right which the employee had in this respect would not go to his widow. The only "ancient" remedy of those enumerated *supra*, which may be open to persons showing sufficient status as "seamen" is that under the Jones Act, which is useless unless negligence on the part of the employer is established. Therefore the reasons which impelled the seafaring men to want to retain their ancient rights in preference to the right under the Longshoremen's Act substantially would not be present in the instant case; there is no remedy for the deceased's widow outside of the Longshoremen's Act.

The following quotation from *South Chicago Coal and Dock Co. v. Bassett*, *supra*, with relevant references to the Congressional reports and Congressional record gives the history of the amendment of the Bill as it relates to the change of the wording of the Bill from "seamen" to "members of the crew":

"The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States (House Rep. No. 1767, 69th Cong., 2d Ses., pp. 1, 2, 20). They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt 'seamen'. Then, in its final passage, the words 'a master

or member of a crew' were substituted for 'seamen'. (Cong. Rec., 69th Cong., 2d Sess., vol. 68, pt. 5, pp. 5402, 6403, 5908; *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 136.) We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen'. *International Stevedoring Co. v. Haverty*, 272 U.S. 50; *Northern Coal Co. v. Strand*, 278 U.S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern Pacific Co. v. Jensen*, 244 U.S. 205. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable."

The law should be construed to give meaning to the change in the Bill from "seamen" to "members of the crew". In view of the fact that apparently only the *seafaring men* wanted to be excluded from the Act, the law should be construed as not to affect the rights of harbor workers, of watchmen and caretakers.

(For a discussion as to the distinction between a "seaman" and a "member of the crew", see *Carumbo v. Cape Cod S.S. Co.*, 123 F. (2d) 991 (C.A. 1, 1941).

In the case of *Moore Dry Dock Co. v. Pillsbury, Deputy Commissioner, et al*, 100 F. (2d) 245 (C.C.A. 9, 1938), this court said:

“Although the courts thus far [this was prior to the decision in *South Chicago Coal and Dock Co., et al v. Bassett, supra*] have not formulated a precise statement from which it can at once be determined just when an employee is a member of a crew and when he is a harbor worker, they are in agreement upon the principle that Congress, in the enactment of the Longshoremen’s and Harbor Workers’ Compensation Act, intended to except from the operation thereof only those employees ordinarily and generally considered as *seafaring men*, leaving that fact to be determined by the circumstances of each case.” (Matter in brackets ours — also emphasis supplied.)

In the recent case of *Norton, Deputy Commissioner v. Warner Co.*, 321 U.S. 565 (1944) (where the court called attention to the fact that the employee had no duties “in connection with the handling of cargo”) the court cited with the approval the statement in the *South Chicago* case, *supra*, to the effect that the question whether an employee is a member of the crew is one of fact for the deputy commissioner and that his finding thereon is conclusive where supported by evidence, *although the evidence may permit conflicting inferences*. Compare *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 131, decided subsequent to the Norton case, where the court said:



“\* \* \* where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited. Like the commissioner’s determination under the Longshoremen’s & Harbor Workers’ Act (44 Stat. 1424, 33 U.S.C. Sec. 901 *et seq.*), that a man is not a ‘member of a crew’ (*South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251) or that he was injured ‘in the course of employment’ (*Parker v. Motor Boats Sales* 314 U.S. 244) \* \* \* the Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in record’ and a reasonable basis in law.” Accord: *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1947).

It could hardly be stated that a single employee of two vessels which are tied up to a dock and whose major duties, according to his employer, were to keep watch and to keep the vessels clean and oiled and to report any major difficulties was a member of a crew. The fact that at some time in the past he had been a member of the crew of one of the vessels when the vessels had a crew and perhaps would again be a member of the crew if and when the vessel or vessels sailed, does not change the fact that *on the day when the injury occurred*, there was no crew and he was not performing the services of a crew member but only that of a watchman or caretaker. *Taylor v. McManigal*, 89 F. (2d) 583 (1937) (aff’g. 14 F. Supp. 419). It is the status of the employee (determined from his

duties) at the time of injury which decides his right to coverage under the Act. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; particularly as to his status as a crew member. *Long Island R. R. Co. v. Lowe*, 145 F. (2d) 516 (C.A. 2, 1944); *Merritt-Chapman & Scott Corp. v. Willard* - F(2) - (C.A. 2, 6/6/51). Persons who are employed principally as caretakers or watchmen of a vessel in between trips, are not considered to be members of the crew. *Union Oil Co. v. Pillsbury, Deputy Commissioner*, 63 F. (2d) 925 (C.A. 9); *Seneca Washed Gravel Company v. McManigal*, 65 F. (2d) 779 (C.A. 2); *Hillscone S. S. Co. v. Pillsbury, Deputy Commissioner*, 136 F. (2d) 965 (C.A. 9, 1943); *Puget Sound Navigation Co. v. Marshall, Deputy Commissioner*, 31 F. Supp. 903 (Wash. 1940); *La Crosse Dredging Corporation v. McManigal, Deputy Commissioner*, 58 F. Supp. 831 (1945). In *The Union Oil Company case, supra*, as in the instant case, the crew had been discharged and one of the officers was re-engaged as watchman during repairs; he was held to be not a member of the crew.

## SUMMARY

The authorities uniformly hold that the question whether the employee is a member of a crew is one of fact. *South Chicago Coal and Dock Co. v.*

*Bassett, Deputy Commissioner*, 309 U.S. 251 (1940); *Puget Sound Freight Lines v. Marshall, Deputy Commissioner*, 125 F. (2d) 876 (C.A. 9, 1942); *Schantz v. American Dredging Co.*, 138 F. (2d) 534 (C.A. 3, 1943); *Bowen v. Shamrock Towing Co.*, 139 F. (2d) 674 (C.A. 2, 1943). As we understand the above decisions, it is only where *no other conclusion can be drawn* from the basic findings that the question becomes one of law. This is so even where the facts are undisputed: *South Chicago Coal and Dock Co. v. Bassett, supra*; *Puget Sound Freight Lines v. Marshall, supra*. Accord: *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company*, 330 U.S. 469, 478 (1947). Compare: *Gray v. Powell*, 314 U.S. 402, 412 (1941); *United States v. Morgan*, 313 U.S. 409 (1941).

We have not discussed *Anderson v. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C.A. 2, 1945) where the court held that a lighterage captain was not a member of a crew, nor *United States Lighterage Corporation v. Hoey*, 142 F. (2d) 484 (C.A. 2, 1944), nor *Berwind-White Coal Mining Co. v. Rothensies*, 137 F. (2d) 60 (C.A. 3, 1943), nor *Walling v. Bay State Dredging Co.*, 149 F. (2d) 346 (C.A. 1, 1945), because, while they construed the term "member of crew", the construction there related to the use of the

words in Acts other than the Longshoremen's Act and as stated by the Supreme Court "we find little aid in considering the use of the term 'crew' in other statutes having other purposes" (quotation is from *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner*, 309 U.S. 251). Since the word "crew" does not have an "unvarying legal meaning", the issue must be determined according to the facts in the particular case. *South Chicago, etc., supra* also *Bowen v. Shamrock Towing Co.*, 139 F. (2d) 674 (C.A. 2, 1943).

We believe that it cannot be held *as a matter of law* under the evidence that deceased on the day of the injury was a member of a crew within the meaning of the Longshoremen's Act. Cf. *Anderson v. Olympian Dredging Co.*, 57 F. Supp. 827 (Cal. 1944), which was decided since the Norton decision and *Smrekar v. Bay & River Navigation Co.*, 160 P. (2d) 85 (Cal. 1945) cert. den. 66 S. Ct. 338, which contains a complete discussion of cases before and after the Norton decision by the Supreme Court.

## CONCLUSION

In view of the above, it is respectfully submitted that the order of the deputy commissioner was in accordance with law and should have been sustained by the court below. The order or orders of the court below setting aside the award was improper and should be reversed with directions to dismiss the complaint.

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**In The United States Court of Appeals**  
**For the Ninth Circuit**

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J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, under the Longshoremen's  
Act, *Appellant,*

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIRE-  
MEN'S FUND INSURANCE COMPANY, a corporation,  
*Appellees,*

GENEVIEVE LONG, *Amicus Curiae*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION  
HONORABLE DAL M. LEMMON, *Judge*

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**BRIEF OF AMICUS CURIAE**

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**In The United States Court of Appeals**  
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J. J. O'LEARY, Deputy Commissioner, Fourteenth  
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# In The United States Court of Appeals

For the Ninth Circuit

J. J. O'LEARY, Deputy Commissioner,  
Fourteenth Compensation District, under the Longshoremen's Act,

*Appellant,*

vs.

COASTAL NAVIGATION COMPANY, a corporation;  
FIREMEN'S FUND INSURANCE COMPANY, a corporation,

*Appellees,*

GENEVIEVE LONG,

*Amicus Curiae.*

No. 12915

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

## BRIEF OF AMICUS CURIAE

### PRELIMINARY STATEMENT

This court heretofore made and entered its order permitting the filing of a brief *amicus curiae* on behalf of Genevieve Long, who was the claimant before the Deputy Commissioner, and intervenor in the trial court.

This brief is filed to add a supplementary argument to the Government's, not to repeat the same.

## SUMMARY OF ARGUMENT

The District Court applied an erroneous standard to the facts.

*Union Oil Company v. Pillsbury*, 63 F.(2d) 925;

*Puget Sound Navigation Company v. Marshall*, 31 F.Supp. 903;

*Taylor v. McManigal*, 89 F.(2d) 583;

*Diomedes v. Lowe*, 87 F.(2d) 296.

## ARGUMENT

### (a) The Government's argument

The Government argues that the court erred in redetermining the Commissioner's finding of fact.

### (b) Amicus Curiae supplementary argument

The District Court, in holding that there was no evidence to sustain the Commissioner's finding, applied an improper legal standard.

The District Court in its memorandum properly stated that it had no power to weigh or appraise the evidence and that if there was evidence to support the order it must be sustained (Tr. 16). Then in setting up the standard by which the court thought to determine whether there were facts to support the findings, the court said:

"The remedy under the act is exclusive. It was designed to provide compensation in the stead of liability for a class of employees commonly known as longshoremen. These men are mainly employed in loading, unloading, refitting and re-

pairing ships, Senate Report No. 973, 69th Congress, First Session, page 16. *Long's work cannot be said to fit into that category.*" (Emphasis supplied)

While the act may have been primarily designed to include a certain large class of workers, Congress in setting up the legislation broadened its scope to include all maritime workers, save a "master or member of a crew of any vessel \* \* \*" and certain other immaterial exceptions (note that the congressional report used the word "mainly").

The words of the act are:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry-dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—(1.) a master or member of a crew of any vessel \* \* \*." 33 U.S.C.A. Sec. 903. See also the definitions contained in 33 U.S.C.A. Sec. 902.

Thus it is to be seen that the act was designed to be the catch-all; to cover all maritime injuries occurring except to those who might validly be covered by State compensation acts and members of crews of vessels. In other words, the compensation under the act is not limited to the particularly large class of workers for whose benefit it was primarily intended, to wit, Longshoremen and Ship Refitters and Repairmen. It is

not necessary to prove that a maritime injury comes under the act, but rather it comes under the act unless it is excluded. This is born out by the presumption specifically stated in the act as follows:

“In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter.” (33 U.S.C.A., Sec. 920).

Long's death having been unquestionably (and now concededly since the employer did not cross-appeal) caused by maritime injury, the question then becomes solely whether he was excepted from the act as being “a member of a crew.” Not whether his duties fell into the category of the principal class of workers for whose benefit the act was adopted.

Was Long a “member of a crew” of a vessel? The District Court conceded that Long's main duties were to keep watch (Tr. 15). All of his other duties were those commonly associated with caretaking. In fact, the deceased was taking care of two vessels. The company carried Long on its payroll as a watchman (Tr. 26, 27). (The two exhibits so showing were admitted into the record by oral stipulation which is not contained in the present transcript of record but which counsel is orally informed will be made a part of a supplementary record.)

The court must construe the words used by the legislature “a member of a crew of any vessel.” Amicus Curiae contends that the term has been construed adversely to the contention of respondents herein. Three



cases were cited to, but not by, the District Court which amicus curiae feels are inconsistent with the construction of the District Court.

*Union Oil Company v. Pillsbury* (9 Cir.) 63 F.(2d) 925;

*Puget Sound Navigation Company v. Marshall*, 31 F.Supp. 903;

*Taylor v. McManigal*, 89 F.(2d) 583.

A fourth case, equally strong, is *Diomedes v. Lowe*, 87 F.(2d) 296, wherein it was specifically stated at page 298:

“Nor was the decedent a member of a crew. A watchman on a vessel in port is not a seaman excluded by the statute. \* \* \*”

The case of *Union Oil Company v. Pillsbury*, 63 F.(2d) 925, is closely parallel to the case at bar. There one who served as third mate on a vessel while it was on its last voyage stayed on the ship as caretaker when the ship was tied up and this court held that he was covered by the Harbor Workers Act and was not a member of a crew of a vessel.

So in *Puget Sound Navigation Co. v. Marshall*, 31 F.Supp. 903, the injured man was a watchman who sailed on a vessel as a member of the crew when she was in service, which was on weekends, and stayed on the vessel as watchman and caretaker when she was tied-up during the week. The accident occurred while the vessel was tied-up during the week, and the court held that the employee was not a member of the crew of a vessel, so as to be excepted from the Harbor Workers Act.

Likewise, in *Taylor v. McManigal*, 89 F.(2d) 583, the Court of Appeals for the Sixth Circuit held that a man who was employed as an assistant engineer to help put the ship in repair and who expected to sail as a member of the crew as an engineer when the vessel sailed, was covered by the provisions of the Harbor Workers Act.

The duties performed at the time of the injury or death are those which determine the applicability of the act, and not the duties over any extended period of time. *Gallagher's case*, 145 F.(2d) 516, 1945 A. M.C. 143. Thus one may be a member of a crew one day and be outside the act and a watchman or caretaker the next day and be within the act. *Puget Sound Navigation Company v. Marshall*, 31 F.Supp. 903. Thus the circumstances that Long had at one time been a member of the crew and that the employer contended that if the ship ever sailed he was to be carried as a member of the crew are immaterial.

In order to be a member of a crew there must first be a "crew." See *Diomedes v. Lowe*, 87 F.(2d) 296. In that case, it was said at page 298:

"In *Seneca Washed Gravel Corp. v. McManigal*, *supra* (65 F.(2d) 779) we defined the word 'crew' as used in the statute. The word 'crew' is used in the statute to connote a company of seamen belonging to the vessel, usually including the officers."

No doubt there can be a one-man crew. *Norton v. Warner*, 321 U.S. 564, 88 L. ed. 931. But this could only be true if the one-man could navigate the vessel. To what crew did Long belong? Was he a member of

the crew of the Coastal Monarch, or was he a member of the crew of the Coastal Glacier? Which vessel had a crew? Since both vessels require a multi-man crew in order to engage in navigation, it is respectfully submitted that Long himself could not constitute a crew of either vessel, let alone both.

The District Court apparently adopted the view that if the injured or deceased employee performed some duties that were customarily performed by crew members, then he was outside the act. This, of course, was the standard of *International Stevedoring v. Haverty*, 272 U.S. 50, 71 L. ed. 157, which is not now applicable to this Act. *South Chicago Coal & Dock Co., v. Bassett*, 309 U.S. 251, 84 L. ed. 732.

### CONCLUSION

It is respectfully submitted that there was ample evidence to support the Commissioner's ultimate finding that Long was not a member of a crew of a vessel under the proper construction of those terms and that the decision of the trial court should be reversed and the order of the Commissioner reinstated.

Respectfully submitted,

BASSETT & GEISNESS,  
Attorneys for Amicus Curiae.



In the  
United States Court of Appeals  
For the Ninth Circuit

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J. J. O'LEARY, Deputy Commissioner, Fourteenth  
Compensation District, under the Longshoremen's  
Act, *Appellant*,

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIRE-  
MEN'S FUND INSURANCE COMPANY, a corporation,  
and MRS. GENEVIEVE LONG, *Appellees*.

---

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION  
HONORABLE DAL M. LEMMON, *Judge*

---

BRIEF FOR APPELLEES

---

BOGLE, BOGLE & GATES  
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**In the**  
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J. J. O'LEARY, Deputy Commissioner,  
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 der the Longshoremen's Act,

*Appellant,*

vs.

COASTAL NAVIGATION COMPANY, a cor-  
 poration; FIREMEN'S FUND INSURANCE  
 COMPANY, a corporation, and MRS.  
 GENEVIEVE LONG,

*Appellees.*

**No. 12915**

UPON APPEAL FROM THE UNITED STATES DISTRICT  
 COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
 NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

**BRIEF FOR APPELLEES**

**QUESTION INVOLVED ON APPEAL**

Were the findings of appellant, Deputy Commissioner, that decedent Long was a harbor worker under the Longshoremen's and Harbor Workers' Act at the time of his death and not a member of the crew of the D/V "COASTAL GLACIER" in accordance with law? Appellant Deputy Commissioner found decedent was a harbor worker and an employee as defined by the Longshoremen's and Harbor Workers' Act (Tr. 8, 9, 10). The District Court reversed on appeal of the employer and carrier (Tr. 30, 31) holding the Deputy Commis-

sioner had misconstrued the law and that decedent was a member of the crew of the D/V "COASTAL GLACIER" and exempted from the provisions of the Act.

### STATEMENT OF CASE

The undisputed evidence before appellant Deputy Commissioner was very adequately summarized by the trial court;

"The decedent Long was a seagoing man, an engineer of years standing. The Coastal Navigation Company had purchased two vessels, the Coastal Glacier and Coastal Forest, and at the time of the purchase contemplated their use in their Alaska run. Each used a complement of nine or ten men. They were taken to task by the Union which demanded some twelve or thirteen in the crew of each vessel. The company decided that the cost of operation was too great with this added operating cost, so, in March, 1947, removed the vessels from Ketchikan, Alaska, to Seattle, Washington, where they were moored at a pier landing at Kirkland on Lake Washington. All of the crews of both vessels were discharged except Long. He was the Chief Engineer on the Coastal Glacier and he was retained in that capacity. He lived on one of the vessels and as custodian had the duty of keeping both clean, trespassers away, etc. His main duty was to keep watch. He also was to oil the machinery and keep the vessels in mechanical condition so that the vessels would be ready for use by charter or otherwise on a day's notice. The Coastal Glacier sailed on short trips on a few occasions and when it did Long went along as the engineer.

"One Haas, who was not a seagoing man, first

talked with Long about taking Long's place while Long would be away in Minnesota on a contemplated trip to that state. Long was then to see the agent of the company about employing Haas. Haas came back to the pier a few days later and found Long stretched out on his bunk in the Coastal Glacier. Long told him he had slipped and fallen while going down to the engine room. Long died from a bilateral hernia with strangulation.

"Haas, after the injury and death of Long, stayed on as the watchman and caretaker of the ships. He likewise lived on one of them although he was not paid subsistence. After Long's death a Mr. Nilsen was employed to turn over the engines and keep them in good working order, and this he does once a month. The vessels are diesel engine powered and required a diesel man to operate and Long was a diesel engineer. Haas was neither a diesel engineer nor a marine engineer. Although the evidence is obscure upon the point it is to be inferred that the operation of the generators, a daily duty of Long, was performed by Haas after he took charge.

"Long was permanently attached to the vessel. He lodged there and he was provided subsistence aboard. He was paid monthly. These are characteristics of employment of crew members. The Coastal Glacier was kept in condition to sail promptly. The owner was endeavoring to obtain satisfactory charters for her and, had she been chartered, a condition of chartering would have been that Long go aboard as engineer. All of the duties performed by Long as detailed above were maritime in character." (Tr. 14 to 17.)

In addition, the evidence disclosed that decedent was created as a seafaring man at the Seattle Marine Hos-

pital for his injuries prior to his death and that the death certificate described his usual occupation as "Chief Engineer" and his occupation as "Shipping" (Tr. 73). After decedent's death, in addition to one Haas, who was employed solely as a caretaker of the vessel, it was necessary to employ another Chief Engineer, one Nitson to inspect and maintain the complicated machinery in the engine room of the "COASTAL GLACIER."

### **PERTINENT PROVISIONS OF LONGSHOREMEN'S AND HARBOR WORKERS' ACT**

Section 2 (3) (Title 33, Section 903 (3) U.S.C.) of the Longshoremen's and Harbor Workers' Act provides as follows:

"(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

This exemption of crew members from the application of the Longshoremen's and Harbor Workers' Act is repeated in §3 (a) (1) of that Act (Title 33, §903 (a) (1) U.S.C.) reading as follows:

"Sec. 3.(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

“(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net”;

Section 21 (b) of the Act (Title 33, Section 921 (b) U.S.C.) provides as follows:

“If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District).”

(Hereafter for the sake of brevity the Logshoremen's and Harbor Workers' Act will be referred to as the “Act”.)

### APPEAL PRESENTS QUESTION OF LAW

Whether decedent Long was a member of the crew of the “COASTAL GLACIER” at the time of his accident and exempted from the provisions of the Act is plainly a question of law for this Court to review since the evidence before the Deputy Commissioner was undisputed.

*Norton v. Warner Company*, 321 U.S. 565, 88 L. Ed. 931;

*Tucker v. Branham* (3 C.C.A.) 151 F.(2d) 96;

*Daffin v. Pape* (5 C.C.A.) 170 F.(2d) 622.

On two occasions the United States Supreme Court has been faced with the question before this Court as to whether an injured man was an employee under the Act or exempted by reason of being a "member of the crew" of the vessel.

In *South Chicago Coal & Dock Company v. Bassett* (1940) 309 U.S. 251, 86 L.Ed. 732, it appeared that the decedent was employed on a coal barge navigating only in the inland rivers about Chicago whose chief task was described by the court,

"as 'facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat but did no work while the boat was en route from dock to the vessel to be fueled.' The Court of Appeals thought it significant that his only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no 'articles'; that he slept at home and boarded off ship; that he was called very early in the morning each day as he was wanted; that while he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was somewhat akin to temporary employment."

In properly holding that the duties of the decedent were not of a seafaring character the court said:



“That is our concern here in construing this particular statute—the Longshoremen’s and Harbor Workers’ Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term ‘crew’ in other statutes having other purposes. This Act as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 S. Ct. 19, *supra*), were still regarded as distinct from members of a ‘crew.’ They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald v. Baltimore & O. R. Co.* (C.C.A. 4th) 71 F.(2d) 810; *Diomedes v. Lowe* (C.C.A. 2d) 87 F.(2d) 296; *Moore Dry Dock Co. v. Pillsbury* (C. C.A. 9th) 100 F.(2d) 245.

“Regarding the word ‘crew’ in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three ‘deckhands’ and that the captain included the decedent to make up that complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship’s rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as sup-

porting the finding of the deputy commission was the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home, and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water'."

In the subsequent and most recent case involving this question, *Norton v. Warner Company*, 321 U.S. 565, 88 L.Ed. 931 (1944) the deputy commissioner held that a bargeman injured when shifting the barge at a pier was a member of the crew of the barge.

Decedent's duties were found to be as follows:

"Rusin was employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing or for shorter distances, by the winding up of a cable by means of a capstan operated by hand. The barge, which was documented as a vessel of the United States, never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia. Rusin was employed under a union contract with respondent which stated that all bargemen assigned to specific barges in active operation were to be paid a monthly salary of \$80 and were to be provided with quarters. It also stated that compensation was 'for all work performed by bargemen in the operation of his own vessel' and that the rates provided were 'based upon all services

and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.' Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge. When he worked on any other boat, he received wages at an hourly rate, in addition to the monthly salary. Rusin had little experience as a seaman except that which he obtained as a bargeman. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. He could not set the course or control or change it any time. He was subject to orders of respondent's marine superintendent except when in tow at which time he was subject to the control of the tugboat captain. But he had no duties in connection with the handling of cargo and no shore duties. At the time of the injury he was the sole person aboard or employed upon the barge."

In its opinion the court referred to the legislative history of the Act which was adopted to meet the difficulties of the decision of *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086. The court stressed the fact that the maritime unions specifically opposed inclusion of their membership under the terms of the Act preferring their traditional remedies of wages, maintenance and cure and an action for unseaworthi-

ness in lieu of a compensation act. In holding that the duties of Rusin constituted him a seafaring man the court said:

“If a barge without motive power of its own can have a ‘crew’ within the meaning of the Act and if a ‘crew’ may consist of one man, we do not see why Rusin does not meet the requirements. A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water. A crew is generally ‘equivalent to ship’s company’ as Mr. Justice Story said in *United States v. Winn* (C.C.) 3 Summ. 209, Fed. Cas. No. 16,740. But we pointed out in the *Bassett* case that the word does not have ‘an absolutely unvarying legal significance.’ 309 U.S. at p. 258, 84 L.Ed. 736, 60 S. Ct. 544. We know of no reason why a person in sole charge of a vessel on a voyage is not as much a ‘member of the crew’ as he would be if there were two or more aboard. We said in the *Bassett* case that the term ‘crew’ embraced those ‘who are naturally and primarily on board’ the vessel ‘to aid in her navigation.’ Id. 309 U.S. p. 260, 84 L.Ed. 737, 60 S. Ct. 544. But navigation is not limited ‘putting over the helm.’ It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can ‘hand, reef and steer.’ Judge Hough pointed out in *The Buena Venture* (D.C.) 243 F. 797, 799, that ‘every one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage.’ And see *The Minna* (D.C.) 11 F. 759; *Disbrow v. The Walsh Bros.* (D.C.) 36 F. 607, 608 (bargemen). We think that ‘crew’

must have at least as broad a meaning under the Act. For it is plain from the amendment exempting a 'master or member of a crew' that ship's company was not brought under the Act. And we are told by the Senate Report, as already noted, that the purpose of the legislation was to provide compensation for those who 'are mainly employed in loading, unloading, refitting, and repairing ships.' S. Rep. No. 973, *supra*.

"Rusin, unlike the employee in the *Bassett* case, did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other 'crew' only as they were made so by the nature of the vessel and its navigational requirements. The contract under which he was employed stated that the compensation was 'based upon all services and time required to safeguard and operate the barge fleet.' The services rendered conformed to that standard and no other. Rusin moreover had that permanent attachment to the vessel which commonly characterizes a crew. See *A. L. Mechling Barge Line v. Bassett* (C.C.A. 7th) 119 F.(2d) 995."

## PRIOR DECISIONS OF THIS COURT

This court has previously considered the question in the following cases decided before the *Bassett* case; *Union Oil Company v. Pillsburg* (1933) 63 F.(2d) 925 and *Moore Drydock v. Pillsbury* (1938) 106 F.(2d) 245. Subsequent to the *Bassett* case, *supra*, but before the *Norton* case, this court again considered the question in the cases of *Puget Sound Freight Lines v. Mar-*

shall, 125 F.(2d) 878, *Pacific Employers Insurance Company v. Pillsbury* (1942) 130 F.(2d) 21. In both cases the court was concerned with the status of traveling stevedores who lived aboard the vessel who were classified by the court as longshoremen under the Act. In the *Puget Sound Freight Lines* case, the court emphasized the fact that the stevedore had no duties at all to fulfill while the vessel was under way.

In the *Pacific Employers* case, this court adopted the usual classification test for distinguishing between employees under the Act and members of the crew as follows:

“ \* \* \* The distinction between a longshoreman and a crew-member seems to hinge upon whether or not the employee is ‘naturally and primarily on board (the vessel) to aid in her navigation.’ The work done by the claimant had no more relation to navigation than does that performed by a regular longshoreman engaged at a port to assist in loading or discharging the cargo of a boat. As was so well stated in *Carumbo v. Cape Cod S.S. Co.* (1 Cir.) 123 F.(2d) 991, 995, ‘The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a ‘member of a crew’.”

## ANALYSIS OF INCIDENTS OF DECEDENT'S EMPLOYMENT

The undisputed evidence in this case unequivocally establishes that the totality of the duties performed by decedent at the time of his death compel his classification as a member of the diesel vessel "COASTAL GLACIER" and therefore exempted as an employee under the Act.

An analysis of the evidence establishes the following facts:

1. Decedent, a seafaring man, had been permanently attached to the D/V "COASTAL GLACIER" as Chief Engineer from August, 1946, until his death on May 7, 1948.

2. Decedent was paid a monthly wage, lived and slept aboard the vessel and received his subsistence customarily furnished crew members.

3. Decedent's duties were concerned primarily with the navigation of the vessel not only when the vessel was underway but when the vessel was at her pier awaiting expected charters.

4. He was required to inspect, maintain and operate the extensive machinery aboard the vessel and keep her in readiness at all times to go to sea.

5. In the event of the vessel going to sea, his employer stipulated as a part of the charter of the vessel that decedent should serve as Chief Engineer while the vessel was operating under such charter.

6. Decedent served as Chief Engineer on various

voyages of the vessel when she was underway between 1946 and 1948.

7. Decedent was furnished his medical treatment at the Seattle Marine Hospital prior to his death.

8. Decedent had to be partially replaced by another marine engineer after his death.

This recapitulation of the incidents of decedent's service aboard the vessel meets all the tests prescribed by this court and United States Supreme Court to establish his status at the time of his death as that of a "seafaring man" (*Moore Drydock Co. v. Pillsbury, supra*).

The duties decedent was actually performing at the time of his death have a significant bearing on his classification (*Long Island Railroad Company v. Lowe*, 145 F.(2d) 516). The evidence establishes he was descending to the engine room in connection with his duties as Chief Engineer when he slipped on a ladder (Tr. 48).



## AUTHORITIES SUPPORT DECEDENT'S CLASSIFICATION AS CREW MEMBER

While it is unnecessary to burden the court with the decisional law of other jurisdictions, the following cases support the ruling of the District Court that decedent was a member of the crew:

*United States v. Lindgren* (4 C.C.A.) 28 F. (2d) 991;

*Carumbo v. Cape Cod S.S. Co.* (C.C.A.) 123 F.(2d) 991;

*Schanz v. American Dredging Co.* (5 C.C.A.) 138 F.(2d) 534;

*Bowen v. Shamrock Towing Company*, 139 F.(2d) 674;

*Jones v. Shepherd* (Miss.) 20 F. Supp. 345;

*Coos Bay Lumber Company v. Pillsbury* (D.C. Cal.) 37 F.S. 915;

*Carvello v. Fregita* (Miss.) 42 F. Supp. 404;

*Pere Marquette v. Bassett* (Mich.) 42 F. Supp. 781.

In the most recent case decided by a United States Court of Appeals, *Daffin v. Pape* (5 C.C.A. 1948) 170 F.(2d) 622, the facts were strikingly similar to those at bar. Daffin's duties were described as follows:

“Daffin sailed with the yacht on every trip; he performed duties essential to the purpose and success of the voyage; and, between trips, while the yacht was in port, he labored to prepare her for the next voyage. For several days prior to the accident, he had worked to put the yacht in readiness

for a trip which was to have started the day after the accident. A few minutes before the accident, he had been checking the engines and filling the gas tanks. The electric power plant was running, and he went into the motor room to cut it off. He pulled the switch, and there was an explosion. From the burns he received, he died. The yacht, at the time was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage. *Carumbo v. Cape Cod S.S. Co.*, 1 Cir. 123 F.(2d) 991.”

The court held:

“Daffin was on board the yacht to aid in her navigation; his labors contributed to the accomplishment of the main objectives toward which the vessel was engaged, That he had not signed articles and did not eat and sleep aboard the vessel when it was in port, was of no consequence.

“The duties Daffin was performing when he was injured were duties ordinarily performed by a member of the crew, and we think, as did the judge below, that he must be considered, in law, to have been a member of the Vigilant’s crew.”

## DECEDENT'S STATUS AS CARETAKER

Appellant Deputy Commissioner's segregated finding that decedent was a caretaker of the vessel and Chief Engineer when the vessel was underway (Tr. 8) completely misconceives the over-all nature of decedent's duties, which were to keep the vessel ready at all times for navigation and to be in charge of the engine room when the vessel was underway.

In *Tucker v. Branham, Deputy Commissioner* (3 C. C.A.) 151 F.(2d) 96, the Deputy Commissioner's findings that a bargee was a caretaker and not a crew member was set aside. The claimant was the sole employee on a non-self-propelled barge operated only in the harbor of Philadelphia. He had no seaman's papers.

His duties were to supervise the loading and unloading of the barge, to unfasten lines and to protect the barge from damage and otherwise safeguard the interests of the owner. In reversing the decision of the Deputy Commissioner and holding Tucker a member of the crew the court said:

"The fact that Dillon was a caretaker is immaterial. He did take care of the barge but no one fact is conclusive. The purpose of the Longshoremen's and Harbor Workers' Compensation Act, as is pointed out in S. Rep. No. 973, 69th Cong., 1st Sess. p. 16, was to provide compensation for persons '\* \* \* mainly employed in loading, unloading, refitting, and repairing ship.' These persons ordinarily are longshoremen and ship-fitters. Dillon was not such. He had some duties in respect to the loading and unloading of the 'Army.' These duties, however, as the court below pointed

out, were for the purpose of making sure that the loading or unloading of the barge was done in such a way that it would not be injured by excessive, strain or capsized by unequal loads. In our opinion Dillon falls within the legal category of Rusin in the *Norton* case rather than in that of Schumann in the *Bussett* case."

### DECEDENT'S RIGHTS TO WAGES, MAINTENANCE AND CURE

Appellant at page 19 of his brief inaccurately suggests decedent was not entitled to the classic remedies of a seaman under the Admiralty Law of wages, maintenance and cure. These remedies accrued to decedent by virtue of his status as a seafaring man. *The Osceola*, 189 U.S. 158. These are not absolute rights but arise under certain well-defined circumstances.

As seafaring men frequently ship without signing written articles, as did decedent, no wages were due decedent at the time of his death.

Any maintenance due and unpaid decedent survived to his wife (*Sperbeck v. Burbank & Company*, 88th F. Supp. 623).

Decedent was receiving his cure in the traditional manner of seamen at the Seattle Marine Hospital at the time of his death at no expense to himself.

There is no indemnity in admiralty for death (*The Harrisburg*, 119 U.S. 199, but an admiralty court would apply the Washington State Death Act if the circumstances warranted it (*Western Fuel Company v. Garcia*, 237 U.S. 233). While the record does not

disclose the circumstances of decedent's death, if it were due to negligence his surviving widow would have an action under the Jones Act.

It is thus apparent that nearly all the admiralty remedies whose retention was demanded by the Seamen's Union in lieu of a compensation act exist in this case.

### SUMMARY

In conclusion, since the undisputable evidence establishes decedent's permanent attachment to the D/V "COASTAL GLACIER" of nearly three years of Chief Engineer; further, since decedent's duties were primarily concerned with the safety and navigation of the vessel and the successful functioning of the principal enterprise of the vessel, we submit that Appellant Deputy Commissioner misconstrued the Act in holding that decedent was not a member of the crew of the vessel at the time of his injury and that the decision of the lower court, reversing appellant's decision, should be affirmed by this court.

BOGLE, BOGLE & GATES,  
EDW. S. FRANKLIN,  
*Attorneys for Appellees.*



No. 12928

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United States  
Court of Appeals  
for the Ninth Circuit.

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ESTATE OF HERBERT B. HATCH, Deceased,  
Juanita O. Hatch, Executrix and American  
Trust Company, Executor; JUANITA O.  
HATCH and HERBERT B. HATCH, JR.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of Record

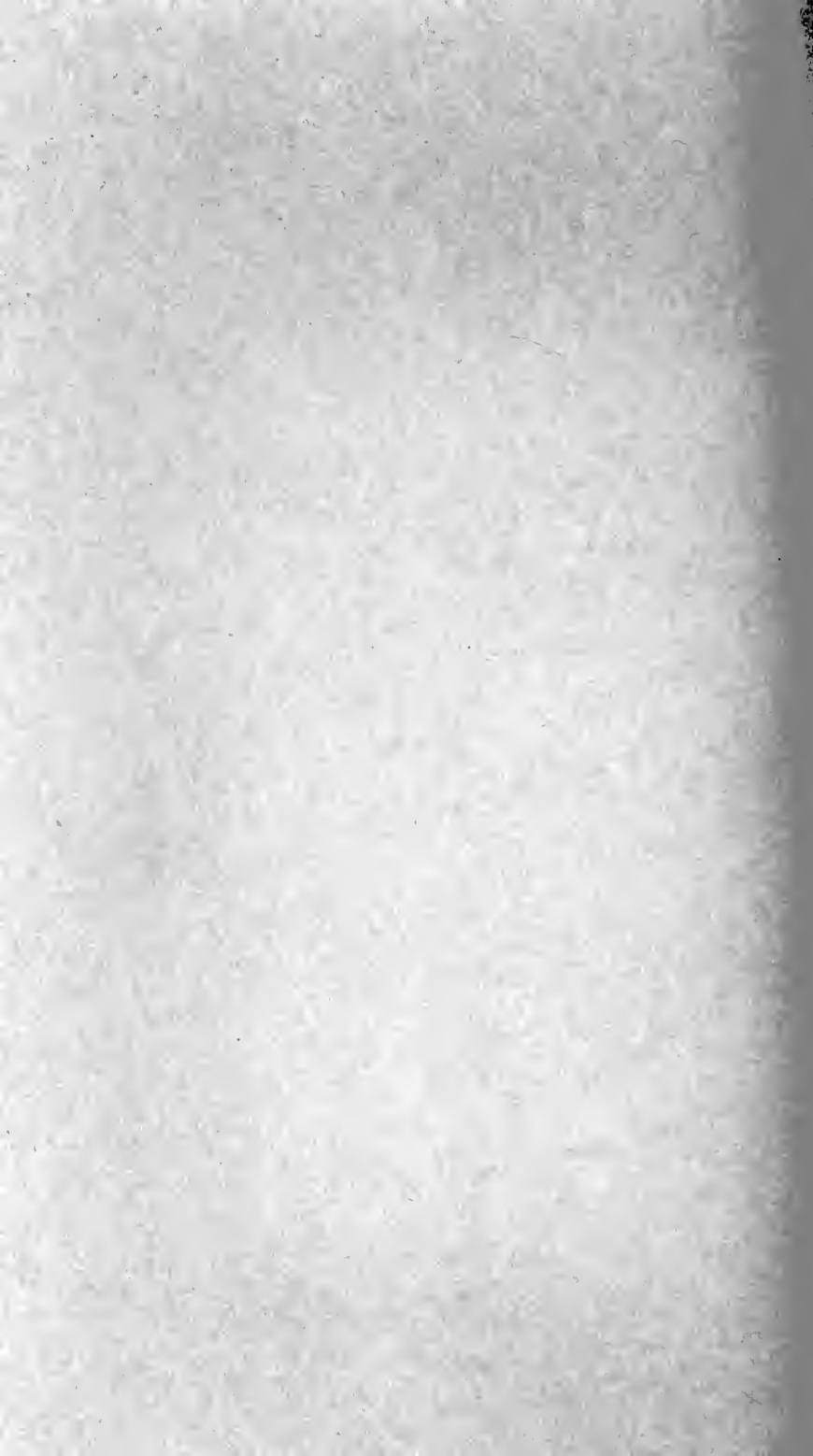
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Petition to Review a Decision of the Tax Court  
of the United States

FILED

AUG 8 1951

PAUL P. O'BRIEN





No. 12928

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United States  
Court of Appeals  
for the Ninth Circuit.

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ESTATE OF HERBERT B. HATCH, Deceased,  
Juanita O. Hatch, Executrix and American  
Trust Company, Executor; JUANITA O.  
HATCH and HERBERT B. HATCH, JR.,

Petitioners,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of Record

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Petition to Review a Decision of the Tax Court  
of the United States



# INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Petitioner:

FREDERIC D. DASSORI, ESQ.,

JOHN W. STOKES, ESQ.,

M. H. COCHRAN, C.P.A.

For Respondent:

C. W. NYQUIST, ESQ.

Transferred to Judge Murdock 12/5/49



The Tax Court of the United States

Docket No. 18482

JUANITA O. HATCH, Executrix, and AMERICAN TRUST COMPANY, Executor Under the Last Will and Testament of HERBERT B. HATCH, Deceased.

Amended Caption:

ESTATE OF HERBERT B. HATCH, Deceased;  
JUANITA O. HATCH, Executrix, and AMERICAN TRUST COMPANY, Executor (See Order 5/24/48),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DOCKET ENTRIES

1948

May 17—Petition received and filed. Taxpayer notified. Fee paid.

May 19—Copy of petition served on General Counsel.

May 24—Order amending the caption to read “Estate of Herbert B. Hatch, Dec’d.; Juanita O. Hatch, Executrix, and American Trust Company, Executor, Petitioner, v. Commissioner of Internal Revenue, Respondent,” entered.

July 7—Answer filed by General Counsel.

July 7—Request for hearing in San Francisco, California, filed by General Counsel.

1948

July 12—Notice issued placing proceeding on San Francisco, California, calendar. Service of answer and request made.

1949

Mar. 11—Hearing set May 9, 1949—San Francisco, California.

May 10—Hearing had before Judge Van Fossan on merits and joint motion to consolidate with Dkt. Nos. 18483 and 18485 for hearing—granted.

May 10—Joint motion and stipulation of facts filed. Briefs due 7/11/49. Reply briefs 8/10/49.

June 10—Transcript of hearing 5/10/49 filed.

July 11—Brief filed by taxpayer. 7/26/49 Copy served.

July 11—Motion for extension to July 25, 1949, to file brief, filed by General Counsel. 7/12/49 Granted.

July 25—Brief filed by General Counsel. Copy served.

1950

Feb. 23—Opinion rendered, Judge Murdock. Decision will be entered for respondent. Copy served.

Feb. 24—Decision entered. Judge Murdock. Div. 3.

May 19—Motion to vacate judgment filed by taxpayer (consented to). Granted.

Dec. 19—Motion for leave to file copy of attached letters testamentary, consented to, filed by taxpayer. 12/22/50 Granted.

Dec. 28—Decision entered. Judge Murdock. Div. 3.



1951

- Mar. 23—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.
- Mar. 23—Proof of service of petition for review filed.
- Mar. 23—Stipulation re consolidation of Dkts. 18482, 18483, 18485 for the purpose of sending to Court only one record on review, filed.
- May 1—Praecipe for record filed by taxpayer with proof of service thereon.
- May 1—Motion to enlarge time to June 21, 1951, to transmit and deliver record filed by taxpayer.
- May 2—Order enlarging time to June 21, 1951, to prepare and transmit the record, entered.

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The Tax Court of the United States  
Docket No. 18483

JUANITA O. HATCH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DOCKET ENTRIES

1948

- May 17—Petition received and filed. Taxpayer notified. Fee paid.
- May 19—Copy of petition served on General Counsel.
- July 7—Answer filed by General Counsel.

1948

- July 7—Request for hearing in San Francisco, California, filed by General Counsel.
- July 12—Notice issued placing proceeding on San Francisco, California, calendar. Service of answer and request made.

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- Feb. 24—Decision entered. Judge Murdock. Div. 3.
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- Dec. 19—Motion for leave to file copy of attached letters testamentary, filed by taxpayer. Consented to. Motion granted 12/22/50.

1950

Dec. 28—Decision entered. Judge Murdock. Div. 3.

1951

Mar. 23—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Mar. 23—Proof of service filed.

Mar. 23—Stipulation to consolidate Dkts. 18482, 18483 and 18485 for the purpose of sending to Court only one record on review, filed.

May 1—Praecipe for record filed by taxpayer with proof of service thereon.

May 1—Motion to enlarge time to 6/21/51 to transmit and deliver record, filed by taxpayer.

May 2—Order enlarging time to 6/21/51 to prepare and transmit the record, entered.

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The Tax Court of the United States

Docket No. 18485

HERBERT B. HATCH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DOCKET ENTRIES

1948

May 17—Petition received and filed. Taxpayer notified. Fee paid.

1948

Mar. 19—Copy of petition served on General Counsel.

July 7—Answer filed by General Counsel.

July 7—Request for hearing in San Francisco, California, filed by General Counsel.

July 12—Notice issued placing proceeding on San Francisco, California, calendar. Service of answer and request made.

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- Mar. 23—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error, filed by taxpayer.
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- Mar. 23—Stipulation to consolidate Dkts. 18482, 18483 and 18485 for the purpose of sending to Court only one record on review, filed.
- May 1—Praecipe for record filed by taxpayer with proof of service thereon.
- May 1—Motion to enlarge time to 6/21/51 to transmit and deliver record, filed by taxpayer.
- May 2—Order enlarging time to 6/21/51 to prepare and transmit record, entered.

The Tax Court of the United States

Docket No. 18482

JUANITA O. HATCH, Executrix, and AMERICAN TRUST COMPANY, Executor, Under the Last Will and Testament of HERBERT B. HATCH, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D:WBH (C:TS:PD:SF:LB) dated February 20, 1948, and as a basis of their proceeding allege as follows:

1. Petitioners Juanita O. Hatch and American Trust Company are the executrix and executor, respectively, under the last will and testament of Herbert B. Hatch, deceased, who died a resident of Stockton, California, on April 9, 1944. Juanita O. Hatch resides at 356 Mountain Ave., Piedmont, California, and American Trust Company has its principal office at 464 California Street, San Francisco, California. The return for the period here involved was filed with the Collector for the first district of California.

2. The notice of deficiency, a copy of which is

attached and marked Exhibit A, was mailed to petitioners on February 20, 1948.

3. The taxes involved are income taxes for the period from January 1, 1944, to April 9, 1944, in the amount of \$3,702.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Increase of income from partnership of Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., doing business as Hatch Chevrolet Company, by \$7,564.10, upon the ground that a part of the gain from the sale of decedent's partnership interest was ordinary income from said partnership, and not a capital gain.

5. The facts upon which the petitioners rely as the basis of this proceeding, are as follows:

5-a. Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., were copartners doing business under the firm name and style of Hatch Chevrolet Company, at Stockton, California, pursuant to agreement entered into on December 1, 1942, in Stockton, California.

5-b. Said partners carried on a business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts, both at wholesale and retail.

5-c. Said partners operated under a franchise for the sale of new automobiles and parts

and accessories, from Chevrolet Motor Division of General Motors Corporation.

5-d. The capital investment of Herbert B. Hatch represented 40/75ths of the partnership, the capital investment of Juanita O. Hatch represented 29/75ths of the partnership, and the capital investment of Herbert B. Hatch, Jr., represented 6/75ths of the partnership.

5-e. On or about February 16, 1944, said partners sold a portion of their respective interests in said partnership to King M. Chase and received therefore the sum of \$161,807.77.

5-f. The cost to the partners of their interests in said partnership, for which they received the sum of \$161,807.77 as alleged in Paragraph 5-e, was \$125,138.70.

5-g. The sale as alleged in Paragraph 5-e represented capital assets of the partnership and the difference between the selling price of \$161,807.77 and the cost of \$125,138.70, or \$36,669.07, represented a capital gain to the partnership.

5-h. The decedent, Herbert B. Hatch, realized a capital gain on such transaction of 40/75ths of said \$36,669.07, or the sum of \$19,556.84, of which 50 per cent was recognized.

5-i. Petitioners as executors of decedent Herbert B. Hatch properly reported said gain in the income tax return filed for decedent for

Wherefore, petitioners pray that this Court may the period January 1, 1944, to April 9, 1944.



hear the proceeding and determine that there is no deficiency due for the taxable year January 1, 1944, to April 9, 1944.

/s/ FREDERIC D. DASSORI,  
/s/ JOHN W. STOKES,  
/s/ M. H. COCHRAN,  
Counsel for Petitioners.

State of California,  
County of San Francisco—ss.

W. Merriam, being duly sworn, says that he is Trust Officer of American Trust Company, one of the petitioners herein, the executor under the last will and testament of Herbert B. Hatch, deceased, and is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ W. MERRIAM.

Subscribed and sworn to before me this 14th day of May, 1948.

[Seal] /s/ ANNE F. SWIFT,  
Notary Public.

My commission expires Aug. 27, 1951.

State of California,  
County of San Francisco—ss.

Juanita O. Hatch, being duly sworn, says that she is one of the petitioners herein, the executrix under the last will and testament of Herbert B.

Hatch, deceased; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ JUANITA O. HATCH.

Subscribed and sworn to before me this 14th day of May, 1948.

[Seal] ANNE F. SWIFT,  
Notary Public.

My commission expires Aug. 27, 1951.

#### EXHIBIT A

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco 5, California

Feb. 20, 1948.

Estate of H. B. Hatch, Deceased;  
Juanita O. Hatch, Executrix, and  
American Trust Co., Executor,  
464 California Street,  
San Francisco, California.

Gentlemen:

You are advised that the determination of the income tax liability of H. B. Hatch, deceased, for the taxable year ended January 1, 1944, to April 9, 1944, discloses a deficiency of \$3,702.31, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,  
Commissioner.

By /s/ F. M. HARLESS,  
Internal Revenue Agent  
in Charge.

Enclosures:

Statement

Form of waiver

Exhibit A

## STATEMENT

San Francisco  
 IRA: 90-D:WBH  
 (C:TS:PD  
 SF:LB)

Estate of H. B. Hatch, Deceased  
 Juanita O. Hatch, Executrix and  
 American Trust Co., Executor  
 464 California Street  
 San Francisco, California

Tax Liability for the Taxable Year January 1, 1944, to April 9, 1944

Income tax deficiency .....\$3,702.31

It is noted that H. B. Hatch died on April 9, 1944.

In making this determination of income tax liability, careful consideration has been given to your protest dated November 5, 1946, and to the statements made at the conferences held on January 13, 1947, and August 18, 1947.

A copy of this letter and statement has been mailed to your representative, John W. Stokes & Co., 1775 Broadway, New York 19, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

## Adjustments to Net Income

Net income as disclosed by return page 4, line 3.....\$51,620.71

Unallowable deductions and additional income:

(a) Partnership income ..... 7,564.10

Total .....\$59,184.81

Nontaxable income and additional deductions:

(b) Capital gain ..... 3,782.06

Net income as adjusted.....\$55,402.75

## Explanation of Adjustments

(a) and (b) Income from the partnership of Hatch Chevrolet Company, Stockton, California, is increased by \$7,564.10 due to the fact that a part of the gain from the sale of your partnership interest has been determined to be ordinary income from the partnership, instead of capital gain of \$3,782.06 (50% of \$7,564.12) reported by you.

Total ordinary net income reported on the

partnership return .....\$75,444.43

Additions to income:

(1) Gain from sale of property other than capital assets.. 14,182.71

Net ordinary income of partnership as adjusted.....\$89,627.14

Your distributive share .....	\$45,401.14	
Partnership salary .....	4,500.00	\$49,901.14
		<hr/>
Amount reported on your return.....		42,337.04
		<hr/>
Increase in partnership ordinary income.....		\$ 7,564.10
Net long-term capital gain reported on the partnership return .....		\$18,334.54

Deductions:

Sale of assets other than capital assets (1/2 of \$14,182.71).....	7,091.36
---	----------

(2) Net long term capital gain of partnership as adjusted....	\$11,243.18
Your distributive share.....	\$ 5,996.36
Amount reported on your return.....	9,778.42

Decrease in capital gain.....	\$ 3,782.06
-------------------------------	-------------

(1) Ordinary gain from sale of property other than capital assets is \$14,182.71 as shown by Exhibit A, attached.

(2) Long-term capital gain from the sale of capital assets of the partnership as shown by Exhibit A, attached.....\$22,486.36

Taxable at 50% .....	\$11,243.18
----------------------	-------------

Computation of Alternative Tax

Net income .....	\$55,402.75
Less: Excess of long-term gain over short-term loss.....	5,996.36
	<hr/>
Ordinary net income.....	\$49,406.39
Less: Personal exemption .....	500.00
	<hr/>
Income subject to normal tax and surtax.....	\$48,906.39
Normal tax at 3% on \$48,906.39.....	\$ 1,467.19
Surtax on \$48,906.39.....	26,032.60
	<hr/>
Partial tax .....	\$27,499.79
Add: 50% of excess of net long-term capital gain over net short-term capital loss.....	2,998.18
	<hr/>
Alternative tax .....	\$30,497.97

Computation of Tax

Net income .....	\$55,402.75
Less: Surtax exemption.....	500.00
	<hr/>
Surtax net income.....	\$54,902.75

Surtax on \$54,902.75.....	\$30,497.06
Net income .....	\$55,402.75
Less: Normal tax exemption.....	500.00
Normal tax net income.....	\$54,902.75
Normal tax, 3% of \$54,902.75.....	1,647.08
Total tax .....	\$32,144.14
Alternative tax .....	\$30,497.97
Correct income tax liability.....	\$30,497.97
Income tax disclosed by return, page 1, line 6 (Original, Acct. No. 3014400 First California District)....	26,795.66
Deficiency of income tax.....	\$ 3,702.31

## Exhibit A

## Computation of Ordinary Gain and Long-Term Capital Gain

On your return for the year 1944, there was included your share, as a partner, of the capital gain reported on the partnership return of Hatch Chevrolet Company filed for the period July 1, 1943, to March 31, 1944, derived from the sale of the assets of the partnership, which share was arrived at as follows:

	Partner's Shares		
	H. B. Hatch	Juanita Hatch	H. B. Hatch, Jr.
	40/75	29/75	6/75
Total			
Proceeds of sale.....	\$161,807.77		
Aggregate bases of business assets .....	125,138.70		
Gain realized .....	\$ 36,669.07		
Amount reported as long- term capital gain—			
· 50% .....	\$ 18,334.54	\$9,778.44	\$7,089.34
		\$1,466.76	

It is held that the transaction constituted a sale by the partnership of assets held pursuant to its business; that the following assets transferred in the sale were not capital assets under section 117, Internal Revenue Code, and gain realized thereon was not long-term capital gain:

Items	Proceeds Realized	Bases to Partnership
Accounts Receivable .....	\$ 16,541.46	\$19,655.04
Inventory, New Cars .....	4,288.88	2,953.76
Inventory, Used Cars .....	9,846.00	7,468.73
Inventory, Parts .....	50,707.04	40,426.89
Inventory, Accessories .....	11,602.00	11,664.73
Inventory, Miscellaneous .....	786.92	1,097.38
Inventory, Tires and Tubes .....	6,908.05	3,231.11
Totals.....	\$100,680.35	\$86,497.64

Net gain realized reportable as ordinary gain—\$14,182.72.

The amounts of revised gain from the sale of business assets by the partnership, which are includible in your net income, are shown by the following allocation to members of the revised partnership gain:

		Ordinary Gain Reportable in Full	50% Reportable Portion Long-term Capital Gain
H. B. Hatch	40/75.....	\$ 7,564.12	\$ 5,996.36
Juanita O. Hatch	29/75.....	5,483.97	4,347.36
H. B. Hatch, Jr.	6/75.....	1,134.62	899.45
Total.....		<u>\$14,182.72</u>	<u>\$11,243.17</u>

Received and Filed T.C.U.S. May 17, 1948.

Served May 19, 1948.

The Tax Court of the United States

Docket No. 18482

[Title of Cause.]

### ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a). Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5-a and b. Admits the allegations contained in subparagraphs a and b of paragraph 5 of the petition.

5-c. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph c of paragraph 5 of the petition.

5-d. Admits the allegations contained in subparagraph d of paragraph 5 of the petition.

5-e. Denies the allegations contained in subparagraph e of paragraph 5 of the petition.

5-f. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph f of paragraph 5 of the petition.

5-g, h and i. Denies the allegations contained in subparagraphs g, h and i of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel;

T. M. MATHER,  
LEONARD A. MARCUSSEN,  
Special Attorneys,  
Bureau of Internal Revenue.

Received and filed T.C.U.S. July 7, 1948.



The Tax Court of the United States

Docket No. 18483

JUANITA O. HATCH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D:WBH (C:TS:PD:SF:LB) dated February 20, 1948, and as a basis of her proceeding alleges as follows:

1. Petitioner is an individual and resides at 356 Mountain Ave., Piedmont, California. The return for the period here involved was filed with the Collector for the first district of California.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to petitioner on February 20, 1948.

3. The taxes involved are income taxes for the taxable year ended December 31, 1944, in the amount of \$2,199.38.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Increase of income from partnership of

Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., doing business at Hatch Chevrolet Company, by \$5,483.98, upon the ground that a part of the gain from the sale of petitioner's partnership interest was ordinary income from said partnership, and not a capital gain.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

5-a. Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., were copartners, doing business under the firm name and style of Hatch Chevrolet Company at Stockton, California, pursuant to agreement entered into on December 1, 1942, in Stockton, California.

5-b. Said partners carried on a business of selling, distributing, repairing and servicing **motor** vehicles and motor vehicle parts both at wholesale and retail.

5-c. Said partners operated under a franchise for the sale of new automobiles and parts and accessories, from Chevrolet Motor Division of General Motors Corporation.

5-d. The capital investment of Herbert B. Hatch represented 40/75ths of the partnership, the capital investment of Juanita O. Hatch represented 29/75ths of the partnership, and the capital investment of Herbert B. Hatch, Jr., represented 6/75ths of the partnership.

5-e. On or about February 16, 1944, said partners sold their respective interests in said

partnership to King M. Chase, and received therefor the sum of \$161,807.77.

5-f. The cost to the partners of their interests in said partnership, for which they received the sum of \$161,807.77 as alleged in Paragraph 5-e, was \$125,138.70.

5-g. The sale as alleged in Paragraph 5-e represented capital assets of the partnership, and the difference between the selling price of \$161,807.77 and the cost of \$125,138.70, or \$36,669.07, represented a capital gain to the partnership.

5-h. Petitioner Juanita O. Hatch realized a capital gain in such transaction of 29/75ths of said \$36,669.07, or the sum of \$14,178.70, of which 50 per cent was recognized.

5-i. Petitioner Juanita O. Hatch properly reported said gain in her income tax return filed for the year ended December 31, 1944.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due for the taxable year ended December 31, 1944.

/s/ FREDERIC D. DASSORI,

/s/ JOHN W. STOKES,

/s/ M. H. COCHRAN,

Counsel for Petitioner.

State of California,  
County of San Francisco—ss.

Juanita O. Hatch, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or has had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ JUANITA O. HATCH.

Subscribed and sworn to before me this 14th day of May, 1948.

[Seal]      /s/ ANNE F. SWIFT,  
Notary Public.

My commission expires Aug. 27, 1951.

### EXHIBIT A

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco 5, California

Feb. 20, 1948.

Mrs. Juanita O. Hatch,  
356 Mountain Avenue,  
Piedmont, California.

Dear Mrs. Hatch:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$2,199.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,  
Commissioner.

By /s/ F. M. HARLESS,  
Internal Revenue Agent  
in Charge.

Enclosures:

Statement  
Form 1276  
Form of waiver  
Exhibit A

## STATEMENT

San Francisco  
 IRA: 90-D:WBH  
 (C:TS:PD  
 SF:LB)

Mrs. Juanita O. Hatch  
 356 Mountain Avenue  
 Piedmont, California

Tax Liability for the Taxable Year Ended December 31, 1944

Income tax deficiency.....\$2,199.38

In making this determination of your income tax liability, careful consideration has been given to your protest dated November 5, 1946, and to the statements made at the conferences held on January 13, 1947, and August 18, 1947.

A copy of this letter and statement has been mailed to your representative, John W. Stokes & Co., 1775 Broadway, New York 19, N. Y., in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

## Adjustments of Net Income

Net income as disclosed by return, page 4, line 3.....\$37,007.47

Unallowable deductions and additional income:

(a) Partnership income ..... 5,483.98

Total .....\$42,491.45

Nontaxable income and additional deductions:

(b) Capital gain ..... 2,741.99

Net income as adjusted.....\$39,749.46

## Explanation of Adjustments

(a) and (b) Income from the partnership of Hatch Chevrolet Company, Stockton, California, is increased by \$5,483.98 due to the fact that a part of the gain from the sale of your partnership interest has been determined to be ordinary income from the partnership, instead of capital gain of \$2,741.99 (50% of \$5,483.98) reported by you.

Total ordinary net income reported on the  
 partnership return .....\$75,444.43

Additions to income:

(1) Gain from sale of property other than capital assets.. 14,182.71

Net ordinary income of partnership as adjusted.....\$89,627.14

Your distributive share .....	\$32,915.83
Amount reported on your return.....	27,431.85

Increase in partnership ordinary income.....	\$ 5,483.98
Net long-term capital gain reported on the partnership return .....	\$18,334.54

Deductions:

Sale of assets other than capital assets.....	7,091.36
---	----------

(2) Net long-term capital gain of partnership as adjusted....	\$11,243.18
Your distributive share.....	\$ 4,347.36
Amount reported on your return.....	7,089.35

Decrease in capital gain.....	\$ 2,741.99
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(1) Ordinary gain from sale of property other than capital assets is \$14,182.71 as shown by Exhibit A, attached.

(2) Long-term capital gain from the sale of capital assets of the partnership as shown by Exhibit A, attached.....	\$22,486.36
Taxable at 50%.....	\$11,243.18

Computation of Alternative Tax

Net income .....	\$39,749.46	
Less: Excess of net long-term capital gain over net short-term capital loss.....	6,056.53	
Ordinary net income .....	\$33,692.93	
Less: Surtax exemptions .....	1,500.00	
Balancee (surtax net income).....	\$32,192.93	
Surtax .....		\$14,585.40
Ordinary net income .....	\$33,692.93	
Less: Normal tax exemption.....	500.00	
Balance subject to normal tax.....	\$33,192.93	
Normal tax at 3%.....		995.79
Partial tax .....		\$15,581.19
50% of excess of net long-term capital gain over net short-term capital loss.....		3,028.27
Alternative tax .....		\$18,609.46

Computation of Tax

Net income .....	\$39,749.46	
Less: Surtax exemption.....	1,500.00	
Surtax net income.....	\$38,249.46	
Surtax on \$38,249.46.....		\$18,532.13

Net income .....	\$39,749.46	
Less: Normal tax exemption.....	500.00	
	<hr/>	
Normal tax net income.....	\$39,249.46	
Normal tax, 3% of \$39,249.46.....		1,177.48
	<hr/>	
Total tax .....		\$19,709.61
Alternative tax .....		\$18,609.46
Correct income tax liability.....		\$18,609.46
Income tax disclosed by return, page 1, line 6 (Original, Account No. 3005157 First California District).....		16,410.08
	<hr/>	
Deficiency of income tax.....		\$ 2,199.38

**Exhibit A****Computation of Ordinary Gain and Long-Term Capital Gain**

On your return for the year 1944, there was included your share, as a partner, of the capital gain reported on the partnership return of Hatch Chevrolet Company filed for the period July 1, 1943, to March 31, 1944, derived from the sale of the assets of the partnership, which share was arrived at as follows:

	Partner's Shares		
	H. B. Hatch	Juanita Hatch	H. B. Hatch, Jr.
	40/75	29/75	6/75
Total			
Proceeds of sale.....	\$161,807.77		
Aggregate bases of business assets .....	125,138.70		
	<hr/>		
Gain realized .....	\$ 36,669.07		
Amount reported as long- term capital gain—			
50% .....	\$ 18,334.54	\$9,778.44	\$7,089.34
		\$1,466.76	

It is held that the transaction constituted a sale by the partnership of assets held pursuant to its business; that the following assets transferred in the sale were not capital assets under section 117, Internal Revenue Code, and gain realized thereon was not long-term capital gain:

Items	Proceeds Realized	Bases to Partnership
Accounts Receivable .....	\$ 16,541.46	\$19,655.04
Inventory, New Cars .....	4,288.88	2,953.76
Inventory, Used Cars .....	9,846.00	7,468.73
Inventory, Parts .....	50,707.04	40,426.89
Inventory, Accessories .....	11,602.00	11,664.73
Inventory, Miscellaneous .....	786.92	1,097.38
Inventory, Tires and Tubes .....	6,908.05	3,231.11
	<hr/>	<hr/>
Totals.....	\$100,680.35	\$86,497.64



Net gain realized reportable as ordinary gain—\$14,182.72.

The amounts of revised gain from the sale of business assets by the partnership, which are includible in your net income, are shown by the following allocation to members of the revised partnership gain:

		Ordinary Gain Reportable in Full	50% Reportable Portion Long-term Capital Gain
H. B. Hatch	40/75.....	\$ 7,564.12	\$ 5,996.36
Juanita O. Hatch	29/75.....	5,483.97	4,347.36
H. B. Hatch, Jr.	6/75.....	1,134.62	899.45
Total.....		<u>\$14,182.72</u>	<u>\$11,243.17</u>

Received and Filed T.C.U.S. May 17, 1948.

Served May 19, 1948.

The Tax Court of the United States

Docket No. 18483

[Title of Cause.]

### ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a). Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5-a and b. Admits the allegations contained in subparagraphs a and b of paragraph 5 of the petition.

5-c. For lack of knowledge or information suffi-

cient to form a belief, denies the allegations contained in subparagraph c of paragraph 5 of the petition.

5-d. Admits the allegations contained in subparagraph d of paragraph 5 of the petition.

5-e. Denies the allegations contained in subparagraph e of paragraph 5 of the petition.

5-f. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph f of paragraph 5 of the petition.

5-g, h and i. Denies the allegations contained in subparagraphs g, h and i of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel;

T. M. MATHER,  
LEONARD A. MARCUSSEN,  
Special Attorneys,  
Bureau of Internal Revenue.

Received and filed T.C.U.S. July 7, 1948.

The Tax Court of the United States

Docket No. 18485

HERBERT B. HATCH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D:WBH (C:TS:PD:SF:LB) dated February 20, 1948, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual and resides at Placerville, California. The return for the period here involved was filed with the Collector for the first district of California.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to petitioner on February 20, 1948.

3. The taxes involved are income taxes for the taxable year ended December 31, 1944, in the amount of \$187.22.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Increase of income from partnership of

Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., doing business as Hatch Chevrolet Company, by \$1,134.63, upon the ground that a part of the gain from the sale of petitioner's partnership interest was ordinary income from said partnership, and not a capital gain.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

5-a. Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., were copartners, doing business under the firm name and style of Hatch Chevrolet Company, at Stockton, California, pursuant to agreement entered into on December 1, 1942, in Stockton, California.

5-b. Said partners carried on a business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts both at wholesale and retail.

5-c. Said partners operated under a franchise for the sale of new automobiles and parts and accessories, from Chevrolet Motor Division of General Motors Corporation.

5-d. The capital investment of Herbert B. Hatch represented 40/75ths of the partnership, the capital investment of Juanita O. Hatch represented 29/75ths of the partnership, and the capital investment of Herbert B. Hatch, Jr., represented 6/75ths of the partnership.

5-e. On or about February 16, 1944, said partners sold their respective interests in said

partnership to King M. Chase, and received therefor the sum of \$161,807.77.

5-f. The cost to the partners of their interests in said partnership, for which they received the sum of \$161,807.77 as alleged in Paragraph 5-e, was \$125,138.70.

5-g. The sale as alleged in Paragraph 5-e represented capital assets of the partnership and the difference between the selling price of \$161,807.77 and the cost of \$125,138.70, or \$36,669.07, represented a capital gain to the partnership.

5-h. Petitioner, Herbert B. Hatch, Jr., realized a capital gain on such transaction of 6/75ths of said \$36,669.07, or the sum of \$2,933.53, of which 50 per cent was recognized.

5-i. Petitioner, Herbert B. Hatch, Jr., properly reported said gain in his income tax return filed for the year ended December 31, 1944.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due for the taxable year ended December 31, 1944.

/s/ FREDERIC D. DASSORI,

/s/ JOHN W. STOKES,

/s/ M. H. COCHRAN,

Counsel for Petitioner.

State of California,  
County of El Dorado—ss.

Herbert B. Hatch, Jr., being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or has had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ HERBERT B. HATCH, JR.

Subscribed and sworn to before me this 14th day of May, 1948.

[Seal]      /s/ THOMAS MAUL,  
Notary Public.

### EXHIBIT A

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco 5, California

Feb. 20, 1948.

Mr. H. B. Hatch, Jr.,  
c/o Hatch Chevrolet Co.,  
Placerville, California.

Dear Mr. Hatch:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$187.22, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,  
Commissioner.

By /s/ F. M. HARLESS,  
Internal Revenue Agent  
in Charge.

Enclosures:

Statement

Form 1276

Form of waiver

Exhibit A

## STATEMENT

San Francisco  
 IRA : 90-D : WBH  
 (C : TS : PD :  
 SF : LB)

Mr. H. B. Hatch, Jr.  
 c/o Hatch Chevrolet Co.  
 Placerville, California

Tax Liability for the Taxable Year Ended December 31, 1944

Income tax deficiency.....\$187.22

In making this determination of your income tax liability, careful consideration has been given to your protest dated November 5, 1946, and to the statements made at the conferences held on January 13, 1947, and August 18, 1947.

## Adjustments to Net Income

Net income as disclosed by return.....\$ 7,387.30

Unallowable deductions and additional income:

(a) Partnership income ..... 1,134.63

Total .....\$ 8,521.93

Nontaxable income and additional deductions:

(b) Capital gain ..... 567.31

Net income as adjusted.....\$ 7,954.62

## Explanation of Adjustments

(a) and (b) Income from the partnership of Hatch Chevrolet Company, Stockton, California, is increased by \$1,134.63 due to the fact that a part of the gain from the sale of your partnership interest has been determined to be ordinary income from the partnership, instead of capital gain of \$567.31 (50% of \$1,134.62) reported by you.

Total ordinary net income reported on the

partnership return .....\$75,444.43

Additions to income:

(1) Gain from sale of property other than capital assets.. 14,182.71

Net ordinary income of partnership as adjusted.....\$89,627.14

Your distributive share.....\$ 6,810.17

Amount reported on your return..... 5,675.54

Increase in partnership ordinary income.....\$ 1,134.63

Net long-term capital gain reported on the

partnership return .....\$18,334.54

Deductions:

Sale of assets other than capital assets..... 7,091.36



(2) Net long-term capital gain of partnership as adjusted.....	\$11,243.18
Your distributive share.....	\$ 899.46
Amount reported on your return.....	1,466.77

Decrease in capital gain.....\$ 567.31

(1) Ordinary gain from sale of property other than capital assets is \$14,182.71 as shown by Exhibit A, attached.

(2) Long-term capital gain from the sale of capital assets of the partnership as shown by Exhibit A, attached.....	\$22,486.36
Taxable at 50%.....	\$11,243.18

#### Computation of Tax

Net income .....	\$ 7,954.62	
Less: Surtax exemption.....	1,000.00	
Surtax net income.....	\$ 6,954.62	
Surtax on \$6,954.62.....		\$ 1,646.39
Net income .....	\$ 7,954.62	
Less: Normal tax exemption.....	500.00	
Normal tax net income.....	\$ 7,454.62	
Normal tax, 3% of \$7,454.62.....		223.64
Correct income tax liability.....		\$ 1,870.03
Income tax disclosed by return, page 1, line 6 (Original, First California District).....		1,682.81
Deficiency of income tax.....		\$ 187.22

#### Exhibit A

##### Computation of Ordinary Gain and Long-Term Capital Gain

On your return for the year 1944, there was included your share, as a partner, of the capital gain reported on the partnership return of Hatch Chevrolet Company filed for the period July 1, 1943, to March 31, 1944, derived from the sale of the assets of the partnership, which share was arrived at as follows:

	Total	Partner's Shares		
		H. B. Hatch	Juanita Hatch	H. B. Hatch, Jr.
Proceeds of sale.....	\$161,807.77	40/75	29/75	6/75
Aggregate bases of business assets .....	125,138.70			
Gain realized .....	\$ 36,669.07			
Amount reported as long- term capital gain—				
50% .....	\$ 18,334.54	\$9,778.44	\$7,089.34	\$1,466.76

It is held that the transaction constituted a sale by the partnership of assets held pursuant to its business; that the following assets transferred in the sale were not capital assets under section 117, Internal Revenue Code, and gain realized thereon was not long-term capital gain:

Items	Proceeds Realized	Bases to Partnership
Accounts Receivable .....	\$ 16,541.46	\$19,655.04
Inventory, New Cars .....	4,288.88	2,953.76
Inventory, Used Cars .....	9,846.00	7,468.73
Inventory, Parts .....	50,707.04	40,426.89
Inventory, Accessories .....	11,602.00	11,664.73
Inventory, Miscellaneous .....	786.92	1,097.38
Inventory, Tires and Tubes .....	6,908.05	3,231.11
Totals.....	\$100,680.35	\$86,497.64

Net gain realized reportable as ordinary gain—\$14,182.72.

The amounts of revised gain from the sale of business assets by the partnership, which are includible in your net income, are shown by the following allocation to members of the revised partnership gain:

	Ordinary Gain Reportable in Full	50% Reportable Portion Long-term Capital Gain
H. B. Hatch      40/75.....	\$ 7,564.12	\$ 5,996.36
Juanita O. Hatch   29/75.....	5,483.97	4,347.36
H. B. Hatch, Jr.    6/75.....	1,134.62	899.45
Total.....	\$14,182.72	\$11,243.17

Received and Filed T.C.U.S. May 17, 1948.

Served May 19, 1948.

The Tax Court of the United States

Docket No. 18485

[Title of Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits that petitioner is an individual and resides at Placerville, California; for lack of knowledge or information sufficient to form a belief, denies the remaining allegations contained in paragraph 1 of the petition.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4 (a). Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5-a and b. Admits the allegations contained in subparagraphs a and b of paragraph 5 of the petition.

5-c. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph c of paragraph 5 of the petition.

5-d. Admits the allegations contained in subparagraph d of paragraph 5 of the petition.

5-e. Denies the allegations contained in subparagraph e of paragraph 5 of the petition.

5-f. For lack of knowledge or information suffi-

cient to form a belief, denies the allegations contained in subparagraph f of paragraph 5 of the petition.

5-g, h and i. Denies the allegations contained in subparagraphs g, h and i of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel;  
T. M. MATHER,  
LEONARD A. MARCUSSEN,  
Special Attorneys,  
Bureau of Internal Revenue.

Received and filed T.C.U.S. July 7, 1948.

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The Tax Court of the United States  
Docket Nos. 18482, 18483, and 18485

[Title of Causes.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to each of these proceedings that the

following facts shall be taken as true and received as evidence in each of these proceedings, together with all exhibits submitted with this stipulation and made a part hereof, subject to the right of either party in each of these proceedings to offer further and additional evidence not inconsistent with or contrary to the facts herein stipulated.

1. The taxes involved are income taxes as follows:

Taxpayer	Period	Amount
Estate of Herbert B. Hatch, Deceased.....	1/1/44- 4/ 9/44	\$3,702.31
Juanita O. Hatch.....	1/1/44-12/31/44	2,199.38
Herbert B. Hatch, Jr.....	1/1/44-12/31/44	187.22

2. On December 1, 1942, Herbert B. Hatch, now deceased; Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., of Stockton, California, entered into a written agreement of co-partnership. A copy of said agreement is attached hereto and marked Exhibit 1-A. The partners adopted Hatch Chevrolet Co. as the name of the partnership business.

3. On October 9, 1942, Herbert B. Hatch, Jr., was a member of the United States Army Air Corps. On that date he executed a general power of attorney to his father, Herbert B. Hatch.

4. On February 16, 1944, an agreement was entered into between Herbert Brooks Hatch, Juanita Osborn Hatch, and H. B. Hatch, Jr., as co-partners, as parties of the first part, and King M. Chase, party of the second part, and Chase made a payment of \$5,000.00 at that time. A copy of said agreement is attached hereto and marked Exhibit

2-B. The "statement" which is a part of said Exhibit 2-B reflects only the items to be transferred to Chase pursuant to said agreement for the tentative sales price of \$175,229.51. It is not a financial statement of the partnership. It does not include cash in bank which was retained by the partnership in the amount of \$35,249.90 and two automobiles having a book value of \$1,542.66, and certain liabilities not assumed by the purchaser in the amount of \$15,588.55.

5. On March 3, 1944, the partners delivered a bill of sale to King M. Chase. A copy of said bill of sale is attached hereto and marked Exhibit 3-C. The "statement" which is a part of said exhibit is not a financial statement of the partnership. \$156,807.77 of the purchase price of \$161,807.77 was paid by King M. Chase by means of a check, a copy of which is attached and marked Exhibit 4-D. The interests of the partners or the assets of the partnership (as the Court may determine) which were sold to Chase had a total cost basis of \$125,138.70 and the gain on the sale was \$36,669.07. The refund of the reserve for bad debts as provided for in the agreement of February 16, 1944, was made by Chase subsequent to the close of the partnership's fiscal year ended June 30, 1944.

6. Herbert B. Hatch died a resident of Stockton, California, on April 9, 1944.

7. The assets of the partnership which were sold to King M. Chase were not distributed in kind to the co-partners prior to the sale thereof. Partial

distributions were made to the co-partners on the dates specified below by checks drawn on the co-partners' account with the American Trust Company's Stockton offices in the amounts shown below:

#4	6/12/44	Estate of Herbert Brooks Hatch, Sr. Deceased.....	\$40,000.00
#5	6/12/44	Juanita O. Hatch.....	29,000.00
#6	6/12/44	Herbert Brooks Hatch, Jr. ....	6,000.00
#11	9/ 9/44	Estate of Herbert Brooks Hatch, Sr., Deceased.....	53,333.33
#12	9/ 8/44	Juanita O. Hatch.....	38,666.67
#13	9/ 8/44	H. B. Hatch, Jr. ....	8,000.00

Copies of said checks are attached hereto and marked Exhibit 5-E. Other distributions were made to the partners and to the estate of the deceased partner on subsequent dates.

8. An amended partnership return of income (Form 1065) for the fiscal year beginning July 1, 1943, and ending June 30, 1944, was filed by the Hatch Chevrolet Company with the Collector of Internal Revenue for the First District of California on September 19, 1944. In said amended return the partnership reported an ordinary net income in the amount of \$75,444.43 and a long-term capital gain from sale of business in the amount of \$36,669.07, \$18,334.54 of which was to be taken into account. In Schedule J of said amended return the partnership reported the partners' shares of income and credits as follows:

	Ordinary Income	Long Term Capital Gains	Charitable Contributions
H. B. Hatch—			
Stockton, Calif. ....	\$42,337.04	\$ 9,778.42	\$213.33
Juanita O. Hatch.....	27,431.85	7,089.35	154.67
H. B. Hatch, Jr. ....	5,675.54	1,466.77	32.00
Totals.....	\$75,444.43	\$18,334.54	\$400.00

9. An individual income tax return for the period January 1, 1944, to April 9, 1944 (date of death) was filed by the executors of the Estate of H. B. Hatch with the Collector of Internal Revenue for the First District of California on March 3, 1945. In said return there was reported ordinary income from partnership of the Hatch Chevrolet Company in the amount of \$42,337.04 and there was reported on Schedule D as a long-term capital gain, "as shown on amended partnership return of Hatch Chevrolet Company, Stockton, California, \$9,778.42," the amount being shown in the column entitled "Gain or loss to be taken into account."

10. The petitioner Juanita O. Hatch filed her individual income tax return for the year 1944 with the Collector of Internal Revenue for the First District of California on January 15, 1945. In said return there was reported ordinary income from partnership of the Hatch Chevrolet Company in the amount of \$27,431.85, and there was reported on Schedule D as a long-term capital gain, "as shown on amended partnership return of Hatch Chevrolet Company, Stockton, California, \$7,089.35," the amount being shown in the column entitled "Gain or loss to be taken into account."

11. An individual income tax return for Herbert B. Hatch, Jr., for the year 1944 was filed with the Collector of Internal Revenue for the First District of California on February 26, 1945. In said return there was reported ordinary income from partnership of the Hatch Chevrolet Com-



pany in the amount of \$5,675.54, and there was reported on Schedule D as a long-term capital gain, "as shown on amended partnership return of Hatch Chevrolet Company, Stockton, California, \$1,466.77," the amount being shown in the column entitled "Gain or loss to be taken into account."

12. A notice of deficiency was mailed to each of the petitioners herein on February 20, 1948, copies of which are attached to the respective petitions.

13. Prior to February 21, 1944, the Hatch Chevrolet Co. operated its business under a franchise from the Chevrolet Motor Division, General Motors Corporation.

/s/ FREDERIC D. DASSORI,  
Counsel for Petitioners.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

## EXHIBIT 1-A

### Partnership Agreement

This Agreement between H. B. Hatch, first party; J. O. Hatch, second party; and H. B. Hatch, Jr., third party; all of Stockton, San Joaquin County, California:

Witnesseth:

### I.

The parties hereto agree to associate themselves as co-partners in the business of selling, distribut-

ing, repairing, and servicing motor vehicles and motor vehicle parts both at wholesale and retail.

## II.

The name of the partnership shall be Hatch Chevrolet Co.

## III.

The principal place of business of the partnership shall be Stockton, San Joaquin County, California.

## IV.

The term of this partnership shall commence December 1st, 1942, and shall continue indefinitely thereafter until dissolved by written notice of dissolution signed by one partner and delivered to or mailed to the last known address of the other partners at least sixty days prior to dissolution, or by operation of law.

## V.

The partners hereto are to receive all of the assets of Hatch Chevrolet Company, a corporation, with principal place of business at Stockton, California, upon dissolution of said corporation, in undivided interests in the following proportions:

The first party receives  $40/75$  of the purchase price.

The second party receives  $29/75$  of the purchase price.

The third party receives  $6/75$  of the purchase price.

These assets shall constitute the capital contribution

to this partnership, and the interests of all parties in the partnership shall be held in the same proportions.

## VI.

No partner shall be required or permitted to advance individual funds to the partnership without the consent of the others, but all advances made with such consent shall bear interest at the rate of 5% per annum, shall be repayable upon demand unless otherwise agreed, and shall not alter the partnership interest of the parties.

## VII.

If any partner with the consent of the others becomes indebted to the partnership, such indebtedness shall be repayable upon demand unless otherwise agreed among them and shall bear interest at 5% per annum.

## VIII.

The first party shall be General Manager of the partnership business and in entire charge of all operations therein with unlimited discretion in such management, except that he shall not have the power to dispose of the business as a whole or of any major portion of the assets thereof, nor make a gift of any of the partnership assets, nor dispose of any of the same for a nominal consideration, without the consent of the others. He shall devote his entire business time to the business of the partnership and shall engage in no other activity for profit except the investment of his private funds

and the management of his private property interests.

### IX.

The second party and the third party shall give general assistance and advice in the management of the business but shall not be required to devote any specific time thereto.

### X.

The first party, in consideration of his services to the partnership, shall have the right to withdraw from the net profits of the partnership all of said net profits up to the sum of \$7200 per year, withdrawable monthly. The amount of the first party's withdrawals upon such basis may be changed from time to time by mutual agreement of all the partners. All net profits remaining in excess of the amount paid to the first party may be distributed from time to time by mutual agreement of the partners among the partners in proportion to their respective contributions of capital above set forth. Loss shall be borne in the same proportions. Contributions to the capital shall not bear interest.

### XI.

All funds received by the partnership shall be deposited in a bank in Stockton, California, and shall be subject to withdrawal by check of the first party.

### XII.

The first party shall cause to be kept at all times correct books of account wherein shall be set

down all moneys received and all moneys expended and all accounts and credits receivable and all obligations incurred. Such books shall be kept at the principal place of business of the partnership and shall be open for inspection by all partners at all times. Accounts shall be balanced at the close of each fiscal year of the partnership, and the net profit or loss shall be determined and withdrawal of the profits, if any, agreed upon. The fiscal year for such purpose shall commence December 1, and end November 30 of the following year, subject to change from time to time by mutual agreement of the partners. Withdrawals of profits may be made during the year from time to time by mutual consent of the partners.

### XIII.

In the event of the dissolution of the partnership by agreement of the partners, a full and complete inventory shall be prepared and the assets, liabilities, and income, both gross and net, shall be ascertained, the debts of the partnership shall be discharged, and all moneys and assets of the partnership then remaining shall be divided in specie among the partners according to their capital contribution.

### XIV.

In the event of the death or withdrawal of one of the partners, the other partners shall have the first option of purchasing the interest of the deceased or withdrawing partner at its book value, said op-

tion to be exercised upon written notice to the withdrawing partner or to the representative of his estate within sixty days after receipt of notice of withdrawal and within sixty days after the appointment and qualification of such representative.

## XV.

In the event that any partner desires to sell his interest in the partnership, the remaining partners, or either of them, shall have the option of purchasing such partner's interest for the same price as the latter shall be willing to accept from any third person, not to exceed in any event the book value of such interest, which option shall extend for a period of sixty days after written notice is given by the intended seller to the remaining partners of his intention to sell and the price offered.

## XVI.

The enumeration of the activities of the partnership herein above-contained shall not be deemed a restriction upon the power of the partnership to carry on incidental and related activities, such as the rental of articles of personal property, the sale of articles other than motor vehicles and motor vehicle parts, the writing and handling of all forms of insurance, insuring both person and property in connection with the business herein above set forth and such other activities as are customarily carried on in connection with a business of this character.

In Witness Whereof, the parties have hereunto

set their hands in triplicate this 1st day of December, 1942.

/s/ H. B. HATCH,  
First Party.

/s/ J. O. HATCH,  
Second Party.

/s/ H. B. HATCH, JR.,  
Third Party.

## EXHIBIT 2-B

### Agreement of Sale

This Agreement made and entered into the 16th day of February, 1944. Parties of the first part are Herbert Brooks Hatch, Sr., generally known as H. B. Hatch, Juanita Osborn Hatch, his wife, and Herbert Brooks Hatch, Jr., over the age of twenty-one (21) years, as co-partners transacting business under the firm, name and style of Hatch Chevrolet Company. H. B. Hatch and Juanita Osborne Hatch are appearing herein on behalf of themselves. H. B. Hatch is representing Herbert Brooks Hatch, Jr., by virtue of a General Power of Attorney, the latter being at the present time in the armed forces of the United States.

Party of the second part is King M. Chase.

Witnesseth:

It Is Agreed that first parties will sell to second party all of the business and assets of Hatch Chevrolet Company, a co-partnership, hereinafter listed.

and the transaction shall be escrowed until a complete inventory and appraisalment has been completed. However, the parties deeming the circumstances to warrant the action, said party of the second part shall take over possession of the physical assets of the business at 8 o'clock A.M. on Monday, February 21, 1944, and thence forward shall operate said business to all intents and purposes as though this transaction had been completed and title thereto passed to the party of the second part.

Second party shall, upon taking possession, have permission to operate the business under the name of Hatch Chevrolet Company for a limited period of time to enable him to make the necessary arrangements for the future title or trade name of said business.

The tentative sales price of said business and assets is the Sum of One Hundred Seventy-five Thousand Two Hundred Twenty-nine and 51/100s Dollars (\$175,229.51). This figure or amount may be appreciated or depreciated according to the results of the inventory to be taken.

Second party takes and assumes all accounts receivable and upon which there has been set up a fifteen per cent (15%) reserve for bad debts on over 90-day accounts and doubted 60-day accounts. Any part of said reserve not used to cover uncollectible accounts is to be re-paid to first parties as soon as practicable and not later than June 30, 1944. On this latter date the parties will review the accounts and make necessary adjustments.



Insurance shall be pro-rated as of the date of the release of the escrow herein, which will be deemed to be the date of sale.

New cars (4) are to be figured at wholesale price plus increment plus also new car freight and handling.

Used cars are to be based upon the Kelley Book retail list.

Parts, accessories, gas, oil, grease, Duco materials, sublet repairs, work in process—labor, miscellaneous merchandise, tires and tubes and tire repair materials, are to be determined by the actual inventory taken, at cost price.

Taxes are also to be pro-rated as of the date of the release of escrow which is to be the date of sale.

Certain direct mail advertising is being prepared for Hatch Chevrolet Company and the expense of the same is to be assumed by party of the second part.

As to the fixed assets, these are to be listed and considered as machinery and shop equipment, parts and accessories, equipment, furniture and fixtures, service cars and other fixed assets. A physical inventory of these fixed assets shall be taken and their appraised value will be mutually fixed and agreed upon by H. B. Hatch and King M. Chase.

There are two items denominated "deferred assets." The first consists of advances to employees in the sum of Four Hundred Twenty-eight and 60/100 Dollars (\$428.60). The second constitutes a G.M.A.C. contingent liability of the present of Twenty-one Thousand Five Hundred Forty-three

Dollars (\$21,543.00). G.M.A.C. holds a repossession reserve of Nine Hundred Ninety-one and 15/100s Dollars (\$991.15) which is to be paid by G.M.A.C. to said party of the second part progressively as said contingent liability is reduced and liquidated. These "deferred assets" are assumed by party of the second part.

Second party assumes the following current liabilities:

Accounts receivable credit balances. \$969.11

Service contract deposits. . . . . \$373.50

Employee War Bonds . . . . . \$290.02

It Is Specifically Understood and Agreed that during the period that second party operates said business under the firm, name and style of Hatch Chevrolet Company that he will, in all respects, save the parties of the first part harmless from any obligations, liabilities or detriment whatsoever and that said second party will carry such types of insurance as shall serve best to afford such protection.

Attached hereto is a "Financial Statment" containing the figures set up as the tentative basis for determining the overall sales and purchase price of One Hundred Seventy-five Thousand Two Hundred Twenty-nine and 51/100s Dollars (\$175,229.51). As hereinabove stated, certain of these items are subject to appreciation or depreciation according to the actual facts found.

It Is Agreed that the sale and purchase herein outlined shall be consummated as soon as the exact figures are ascertained from the inventory and appraisement.

Terms—cash, and cost of taking inventory to be assumed by first parties and second party equally.

It Is Understood and Agreed that if parties of the first part find it necessary to defend themselves against any actions, liabilities or detriments occasioned by second party or to take any action to enforce the terms of this agreement, then and in that event said party of the second part assumes and agrees to pay a reasonable attorney's fee and in the event of an action at law, the costs of suit.

In Witness Whereof the parties have executed this agreement in duplicate the day and year herein first above written, each copy being deemed an original. H. B. Hatch is executing this agreement on behalf of his son, Herbert Brooks Hatch, Jr., by virtue of a General Power of Attorney which he holds.

/s/ HERBERT BROOKS  
HATCH, SR.,

/s/ JUANITA OSBORN HATCH,  
HERBERT BROOKS  
HATCH, JR.,

By /s/ H. B. HATCH, SR.,  
His Attorney in Fact,  
Parties of the First Part,

/s/ KING M. CHASE,  
Party of the Second Part.

## EXHIBIT 3-C

## Bill of Sale

Know All Men by These Presents:

That Herbert Brooks Hatch, Sr., generally known as H. B. Hatch, Juanita Osborn Hatch, his wife, and Herbert Brooks Hatch, Jr., over the age of twenty-one years, as co-partners transacting business under the firm name and style of Hatch Chevrolet Company, the Parties of the First Part, in consideration of the sum of One Hundred Sixty-one Thousand Eight Hundred Seven and 77/100th Dollars (\$161,807.77) current lawful money of the United States of America, to them in hand paid by King M. Chase, the Party of the Second Part, the receipt whereof is hereby acknowledged, do by these presents sell unto the Party of the Second Part, his executors, administrators and assigns, the following described personal property, to wit:

All that property set forth and described in the Inventories listing said personal property—

(1) Parts Department Inventory consisting of 165 pages.

(2) Accessory Department and Miscellaneous Merchandise consisting of 18 pages.

(3) Gas, Oil and Grease Inventory consisting of one page.

(4) Duco Material Inventory consisting of 5 pages.

(5) Work in Process & Sublet Repairs consisting of 5 pages.

(6) Tire Department Inventory consisting of 6 pages.

(7) Machinery and Shop Equipment consisting of 19 pages.

(8) Parts & Accessory Equipment consisting of one page.

(9) Furniture & Fixtures consisting of 7 pages.

(10) Service Cars (7) consisting of one page.

(11) Other Fixed Assets, consisting of one page.

(12) New Cars (4) consisting of one page.

(13) New Car Freight and Handling plus Increment consisting of one page.

(14) Used Cars (13) consisting of one page.

Reference is further made to the financial statement hereto attached covering the period to February 21st, 1944, wherein the purchase price figure is ascertained.

Reference is further made to that certain "Agreement of Sale" entered into the 16th day of February, 1944, between the parties hereto. This Bill of Sale is limited by the terms of said agreement and said agreement is made a part hereof by reference. It is particularly understood and agreed that from and after the hour of eight o'clock A.M. on Monday, February 21st, 1944, said Party of the Second Part

has assumed all liabilities whatsoever arising from the operation of the Hatch Chevrolet Company subsequent to that hour and date and that the parties of the First Part continue to hold and assume any and all liabilities arising from the operation of the Hatch Chevrolet Company prior to that hour and date except such specific liabilities as have been assumed in writing by said Party of the Second Part. Of particular mention are the possible liabilities arising from various Federal and State taxes and from executive orders.

To Have and to Hold, the same unto the Party of the Second Part, his executors, administrators and assigns forever.

And said Parties of the First Part do for their heirs, executors and administrators covenant and agree with the Party of the Second Part, his heirs, executors, administrators and assigns to warrant and defend the sale of the said property, goods and chattels unto the Party of the Second Part, his executors, administrators and assigns against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, the Parties of the First Part have hereunto set their hands the third day of March, 1944.

Herbert Brooks Hatch, Sr., and Juanita Osborn Hatch have signed their names hereto in person. The name of Herbert Brooks Hatch, Jr., was signed

by his father, Herbert Brooks Hatch, Sr., by virtue of a general Power of Attorney.

/s/ HERBERT BROOKS  
HATCH, SR.,

/s/ JUANITA OSBORN HATCH,  
HERBERT BROOKS  
HATCH, JR.,

By /s/ H. B. HATCH,  
His Attorney in Fact.

All signing the same as co-partners transacting business as Hatch Chevrolet Company.





WHERE FRIEND MEETS FRIEND

**Hatch Chevrolet Company** 14533

HATCH DIVISION  
HUNTER SQUARE BRANCH  
11 NORTH HUNTER ST.  
BANK OF AMERICA 90-104  
NATIONAL TRUST & SAVINGS ASSOCIATION  
STOCKTON, CALIFORNIA

MINER AVENUE AT HUNTER  
STOCKTON, CALIFORNIA, March 5, 1946

ONE HUNDRED FIFTY SIX THOUSAND EIGHT HUNDRED SEVEN & 77/100 \$156,807.77

**PAY**

TO THE ORDER OF  
L. B. Hatch, Juanita O. Hatch,  
L. B. Hatch Jr.—Co-Partners

*Hatch Chevrolet Company*

BY \_\_\_\_\_

PAY ONLY THROUGH  
CLEARING HOUSE  
90-1367 MAR 6 1946 90-1367  
AMERICAN TRUST COMPANY  
STOCKTON OFFICE  
STOCKTON, CALIFORNIA

For credit only  
to account of  
H. B. Hatch  
Juanita O. Hatch  
H. B. Hatch Jr.,  
Co-Partners.



4

STOCKTON OFFICE 90-1367

No. -

# AMERICAN TRUST COMPANY

24 NORTH SUTTER STREET



STOCKTON, CALIFORNIA

June 12<sup>th</sup> 1944

Estate of Herbert Brooks Hatch, Deceased. \$40,000<sup>00</sup> -

PAY TO THE ORDER OF

Forty thousand and 00/100 DOLLARS

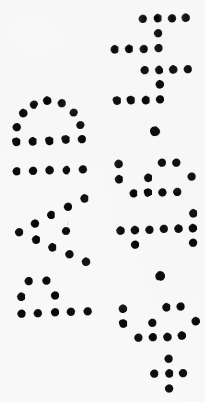
H. B. HATCH - J. O. HATCH and H. B. HATCH, CO-PARTNERS

Wm. D. Hatch



Executors of the Last Will and Testament of Herbert B. Hatch, deceased  
C. W. Cadigan, Assistant Secretary  
American Trust Company  
FOR DEPOSIT

AMERICAN TRUST COMPANY



Wm. D. Hatch  
C. W. Cadigan



P374



STOCKTON OFFICE 90-1367

## AMERICAN TRUST COMPANY

24 NORTH SUTTER STREET

No 5

STOCKTON, CALIFORNIA

PAY TO THE  
ORDER OF*Juanita O. Hatch*

*June 12, 1944*  
 \$89,000.00

*Twenty-nine Thousand and no/100 DOLLARS*  
 H. B. HATCH - JUNIOR & HATCH  
 and H. B. HATCH, JR., CO-ARTISTS

*Juanita O. Hatch*

AMERICAN TRUST COMPANY  
 14-14 SAN FRANCISCO  
 FOR DEPOSIT

DEPOSITED TO THE ACCOUNT OF  
 WITHIN NAMED PARTY  
 ACK OF ENDORSEMENT GUARANTEE  
 AMERICAN TRUST COMPANY  
 14-14 SAN FRANCISCO 11-14

*Payable to Juanita O. Hatch*  
*June 12, 1944*



STOCKTON OFFICE 90-1367

No 6

## AMERICAN TRUST COMPANY

24 NORTH SUTTER STREET



1944

STOCKTON, CALIFORNIA

June 12<sup>th</sup>

\$6000.00

Harbert Brooks Hatch, Jr.

PAY TO THE  
ORDER OF

*Six Thousand and no/100 DOLLARS*  
 H. B. HATCH - JUANITA O. HATCH  
 and H. B. HATCH, Jr., CO-PARTNERS



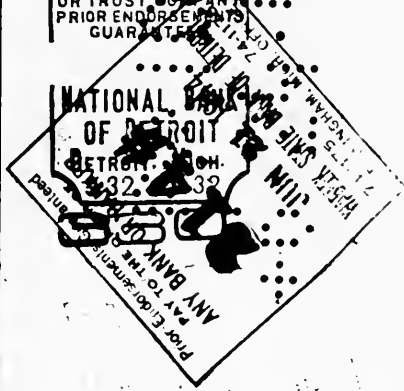
*Juanita O. Hatch*

PAID  
THROUGH  
DETROIT CLEARING  
HOUSE

JUN-22 1944

OR  
PAY TO THE ORDER OF  
ANY BANK, BANKER  
OR TRUST COMPANY  
PRIOR ENDORSEMENTS  
GUARANTEED

NATIONAL BANK  
OF DETROIT  
DETROIT, MICH.  
JUN 22 1944



Pay to the order of the  
Birmingham, Mich. Office.  
Credited to the account of the  
Within named payee with the  
Wabeek State Bank of Detroit  
BIRMINGHAM, MICH. OFFICE.  
JUN 22 1944

Credited to the account of the  
Within named payee with the  
Wabeek State Bank of Detroit  
BIRMINGHAM, MICH. OFFICE.  
JUN 22 1944







STOCKTON OFFICE 90-1367  
**AMERICAN TRUST COMPANY**  
24 NORTH SUTTER STREET

NO 21

STOCKTON, CALIFORNIA September 9, 1944. 19

PAY TO THE  
ORDER OF

ESTATE of H. B. Hatch Deceased

\$53,333.33

**EXACTLY FIFTY THREE THOUSAND AND 33/100**

DOLLARS

H. B. HATCH - JUANITA O. HATCH  
and H. B. HATCH, Jr., CO-PARTNERS  
*Juanita O. Hatch*



PAID TO THE ACCOUNT OF  
AMERICAN TRUST COMPANY  
SAN FRANCISCO  
SEP 15 1944  
AMERICAN TRUST COMPANY  
SAN FRANCISCO  
11-24  
FOR DEPOSIT  
AMERICAN TRUST COMPANY  
L



STOCKTON OFFICE 90-1367



# AMERICAN TRUST COMPANY

24 NORTH SUTTER STREET

No. 12

STOCKTON, CALIFORNIA

September 8, 1944

19

PAY TO THE  
ORDER OF

Juanita O. Hatch

\$ 38,666.67

**EXACTLY 38,666.67 CTS**

H. B. HATCH - JUANITA O. HATCH  
and H. B. HATCH, JR., COPARTNERS



*Juanita O. Hatch*

DOLLARS

PAID 4



STOCKTON OFFICE 90-1367



# AMERICAN TRUST COMPANY

24 NORTH BUTTER STREET

NO 13

STOCKTON, CALIFORNIA September 8, 1944 19

PAY TO THE ORDER OF

H. B. Hatch, Jr.

\$8,000.00

DOLLARS

**EXACTLY \$8,000.00**

H. B. HATCH - JUANITA O. HATCH  
and M. B. HATCH, Jr., COPARTNERS



*Juanita O. Hatch*

Credited to the account of the  
Birmingham Bank of  
Detroit, Mich.  
SEP 18 1944  
PAY TO THE ORDER OF  
ANY BANK OR BANKER  
OR TRUST COMPANY  
PRIOR ENDORSEMENTS  
GUARANTEED

Pay to the order of any Bank  
or Trust Company through the  
Clearing House  
of the City of Detroit, Mich.  
SEP 18 1944

324  
9-32 932  
NATIONAL BANK  
OF DETROIT  
DETROIT, MICH.

Prior Endorsements Guaranteed  
PAY TO THE ORDER OF  
ANY BANK OR BANKER

706

SEP. 14 1944  
WABECK STATE BANK OF DETROIT  
24-1175  
BIRMINGHAM, MICH. OFF.



The Tax Court of the United States

Docket Nos. 18482, 18483, 18485

ESTATE OF HERBERT B. HATCH, Deceased;  
JUANITA O. HATCH, Executrix, and  
AMERICAN TRUST CO., Executor,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

JUANITA O. HATCH,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

HERBERT B. HATCH, JR.,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Promulgated February 23, 1950

Gain or Loss—Capital Asset—Sale by Partners

Where individuals acting as partners sell to another most of the assets of a partnership subject to some of its liabilities, without a distribution of the assets to the partners prior to the sale, and the partnership survives the sale, the transaction is a sale by the partnership of some of its assets and not

a sale by the partners individually of their interests in the partnership, for the purpose of determining to what extent the gain realized upon the sale is taxable to the partners as capital gain.

FREDERIC D. DASSORI, ESQ.,

For the petitioners.

C. W. NYQUIST, ESQ.,

For the respondent.

### OPINION

Murdock, Judge:

The Commissioner determined deficiencies in income tax as follows:

Petitioner	Doc. No.	Taxable Period	Deficiency
Estate of Herbert B. Hatch, Deceased.....	18482	Jan. 1-Apr. 9, 1944	\$3,702.31
Juanita O. Hatch .....	18483	1944	2,199.38
Herbert B. Hatch, Jr. ....	18485	1944	187.22

The sole issue is whether the Commissioner erred in determining that a part of the gain realized by Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., upon a sale involving their partnership business and assets in 1944 is taxable to them as ordinary income.

The facts are stipulated.

Herbert B. Hatch, Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., their son were individuals engaged in the automobile business in Stockton, California, prior to 1944. Their individual returns for the taxable periods involved were filed with the collector of internal revenue for the first district of California.



The Hatches formed a partnership on December 1, 1942, to engage for an indefinite term "in the business of selling, distributing, repairing, and servicing motor vehicles and motor vehicle parts both at wholesale and retail" under the name of Hatch Chevrolet Co. The business was operated under a franchise from the Chevrolet Motor Division of General Motors Corporation. The record does not show whether that franchise was either valuable or transferable.

The Hatches "as co-partners transacting business under the firm, name and style of Hatch Chevrolet Company," parties of the first part, executed an "Agreement of Sale" on February 16, 1944, with King M. Chase, party of the second part, providing in part:

\* \* \* that first parties will sell to second party all of the business and assets of Hatch Chevrolet Company, a co-partnership, hereinafter listed, and the transaction shall be escrowed until a complete inventory and appraisal has been completed. However, \* \* \* said party of the second part shall take over possession of the physical assets of the business \* \* \* on \* \* \* February 21, 1944, and thence forward shall operate said business to all intents and purposes as though this transaction has been completed and title thereto passed to the party of the second part.

Second party shall, upon taking possession, have permission to operate the business under the name of Hatch Chevrolet Company for a limited period of time to enable him to make

the necessary arrangements for the future title or trade name of said business.

The tentative sales price of said business and assets is the sum of \* \* \* (\$175,229.51). This figure or amount may be appreciated or depreciated according to the results of the inventory to be taken.

The Hatches executed a "Bill of Sale" on March 3, 1944, providing that they "as co-partners transacting business under the firm name and style of Hatch Chevrolet Company, the Parties of the First Part, in consideration of the sum of \* \* \* (\$161,807.77) \* \* \* to them in hand paid by King M. Chase, the Party of the Second Part, the receipt whereof is hereby acknowledged, do by these presents sell unto the Party of the Second Part, his executors, administrators and assigns, the following described personal property [listed in a schedule] \* \* \*." Chase paid \$5,000 of the purchase price at the time of the agreement of February 16, and he paid the remainder of the purchase price by means of a check dated March 3, 1944, and payable to the order of the Hatches, "Co-Partners." The property transferred to Chase included all of the assets of the partnership except the General Motors franchise, two automobiles, cash in a substantial amount, and the partnership name. Chase assumed a part, but not all, of the liabilities of the partnership.

The assets of the partnership which were sold to Chase were not distributed in kind to the Hatches

prior to the sale thereof. His check dated March 3 was credited to the bank account of the Hatches, "Co-Partners," on March 6, 1944. Partial distributions were made to them by checks drawn on that account beginning in June, 1944.

Herbert B. Hatch died a resident of Stockton, California, on April 9, 1944. Juanita O. Hatch and American Trust Company are the executrix and executor, respectively, under the last will and testament of Herbert B. Hatch.

The partnership reported on its amended return for the fiscal year ending June 30, 1944, filed on September 19, 1944, a long-term capital gain from the sale to Chase in the amount of \$36,669.07, \$18,-334.54 of which was taken into account and divided as follows:

Herbert B. Hatch .....	\$9,778.42
Juanita O. Hatch .....	7,089.35
Herbert B. Hatch, Jr.....	1,466.77

The Hatches separately reported those amounts on their respective individual returns for the taxable periods involved as "Gain or loss to be taken into account."

The Commissioner allowed the partnership a long-term capital gain from the sale to Chase in the amount of \$22,486.36 (recognized to the extent of \$11,243.18), determined that the gain from the sale in the amount of \$14,182.71 was ordinary income to the partnership from the sale of property other than capital assets, and made corresponding proportionate adjustments in the individual income of Herbert B. Hatch, Juanita O. Hatch, and Herbert

B. Hatch, Jr., for the taxable periods involved, on the ground that “the transaction constituted a sale by the partnership of assets held pursuant to its business; that the \* \* \* [accounts receivable and inventories] transferred in the sale were not capital assets under section 117, Internal Revenue Code, and gain realized thereon was not long-term capital gain.”

The parties stipulate that the cost of “the interests of the partners or the assets of the partnership (as the Court may determine) which were sold to Chase” was \$125,138.70 and the gain was \$36,669.07.

The only difference between the parties in this case is whether the sale to Chase was a sale by the individual partners of their partnership interests or was a sale by the partnership of some of the partnership assets subject to some of the liabilities. The petitioners contend that the Hatches sold their individual interests in the partnership, those interests were capital assets, and the entire gain was a capital gain only one-half of which would have to be reported as taxable income. The respondent has determined that the partnership sold some of its assets subject to some of its liabilities, some of the assets sold were capital assets, and some were not capital assets, with the result that the profit on those assets sold which were not capital assets is taxable in its entirety to the partners as a part of their distributive share of the net income of the partnership.

Each partner's interest in the partnership would

have a basis for gain to the partner, and if it was sold, the gain would be the difference between the amount realized and that basis, which gain would be income of the partner, not of the partnership, and would be a capital gain if the interest had been held long enough. *H. R. Smith*, 10 T.C. 398, *aff'd*. 173 Fed. (2d) 470, *certiorari denied*, ... U. S. . . . , (Oct. 10, 1949). Cf *Joseph L. Merrill*, 9 T.C. 291, *affirmed* 173 Fed. (2d) 310. Likewise, each asset of the partnership would have a basis for computing gain or loss to the partnership, and upon the sale of any of those assets by the partnership the gain would be income to the partnership and would be the difference between the amount realized and the basis to the partnership. The gain on any of the assets which were capital assets held for a long enough period by the partnership would be a capital gain, whereas the gain from the sale of any of the assets which were not capital assets would not be a capital gain but would be ordinary income taxable in its entirety to the partnership. The total of the basis of the partnership assets to a partnership does not necessarily equal the total of the bases to the partners of their interests in that partnership at any given moment. See Regulations 111, Section 29.113(a)(13)-2. Here the stipulation would indicate that the cost basis was the same whether the sale was a sale of partnership assets or a sale of partners' interests in the partnership. However, the gain was computed on a partnership return as a gain from a sale by the partnership of some of its assets, and the Commissioner has so regarded it. Furthermore, it is not easy even to imagine what

part of the basis of each individual partner for his partnership interests would be applied against his share of the amount realized from the sale in question which involved some but not all of the partnership assets. No such method of computing a gain is authorized for federal tax purposes.

The stipulated facts show that the partners made no effort to sell and Chase did not buy their individual interests in the partnership or any part of those interests, but on the contrary, the subject of the sale was a part of the partnership assets subject to a part of the partnership liabilities. The partnership was not terminated by the sale. It retained some of its assets and the amount realized from the sale. Later it distributed its assets to the individual partners in liquidation. The sale was reported and the gain computed on the partnership return for its fiscal year as a partnership transaction and each individual partner merely reported on his separate return on a calendar year basis a part of the gain from the sale as a part of his distributive share of the net income of the partnership. The only change made by the Commissioner was to hold that a part of the gain was ordinary income rather than a capital gain. The stipulated facts do not support the petitioners' contention that the gain of the partnership should be taxed to the partners as capital gain upon the theory that they sold a portion of their partnership interests, which interests were capital assets. The Commissioner did not err.

Decisions will be entered for the respondent.

Served February 23, 1950.

The Tax Court of the United States

Docket No. 18482

ESTATE OF HERBERT B. HATCH, Deceased,  
JUANITA O. HATCH, Executrix, and  
AMERICAN TRUST CO., Executor,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

The petitioner filed a motion to vacate the decision entered in this proceeding on February 24, 1950, because the executor and executrix had been discharged as such on June 3, 1948, by a final decree of the court of probate in California. The decision was vacated on May 19, 1950, pending reappointment of the executor and executrix. A proper certificate was filed on December 19, 1950, showing that the executor and executrix had been again appointed and qualified. Therefore, pursuant to the determination of the Court, as set forth in its opinion promulgated February 23, 1950, it is

Ordered and Decided, that there is a deficiency in income tax of \$3,702.31 for the period January 1 to April 9, 1944.

[Seal]      /s/ J. E. MURDOCK,  
Judge.

Entered Dec. 28, 1950.

Served Dec. 20, 1950.

## The Tax Court of the United States

Docket No. 18483

JUANITA O. HATCH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DECISION

The decision entered in this proceeding on February 24, 1950, was vacated by grant of the petitioners' joint motion on May 19, 1950, upon a showing that the executor and executrix in the related proceeding at Docket No. 18482 had been discharged prior to the date of the decisions in these proceedings. A proper certificate was filed on December 19, 1950, in the proceedings at Docket No. 18482 showing that the executor and executrix had been again appointed and qualified. Therefore, pursuant to the determination of the Court, as set forth in its opinion promulgated February 23, 1950, it is

Ordered and Decided, that there is a deficiency in income tax of \$2,199.38 for the year 1944.

[Seal]      /s/ J. E. MURDOCK,  
Judge.

Entered Dec. 28, 1950.

Served Dec. 29, 1950.



The Tax Court of the United States

Docket No. 18485

HERBERT B. HATCH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

The decision entered in this proceeding on February 24, 1950, was vacated by grant of the petitioners' joint motion on May 19, 1950, upon a showing that the executor and executrix in the related proceeding at Docket No. 18482 had been discharged prior to the date of the decisions in these proceedings. A proper certificate was filed on December 19, 1950, in the proceeding at Docket No. 18482 showing that the executor and executrix had been again appointed and qualified. Therefore, pursuant to the determination of the Court, as set forth in its opinion promulgated February 23, 1950, it is

Ordered and Decided, that there is a deficiency in income tax of \$187.22 for the year 1944.

[Seal]      /s/ J. E. MURDOCK,  
Judge.

Entered Dec. 28, 1950.

Served Dec. 29, 1950.

In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 18482

ESTATE OF HERBERT B. HATCH, Deceased,  
JUANITA O. HATCH, Executrix, and  
AMERICAN TRUST CO., Executor,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

T. C. Docket No. 18483

JUANITA O. HATCH,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

T. C. Docket No. 18485

HERBERT B. HATCH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW AND  
ASSIGNMENT OF ERROR

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

Come now the Estate of Herbert B. Hatch, De-

ceased, Juanita O. Hatch, Executrix, and American Trust Co., Executor, and Juanita O. Hatch and Herbert B. Hatch, Jr., by their attorneys of record, and respectfully show:

## I.

### Jurisdiction and Venue

Petitioners file this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (28 U.S.C., Sections 1141, 1142).

The Court in which the review of these causes is sought is the United States Court of Appeals for the Ninth Circuit.

Herbert B. Hatch, deceased, and Petitioners Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., their son, were residents of Stockton, California, in 1944, and their Federal Income Tax returns for 1944 were filed with the Collector of Internal Revenue for the First District of California at San Francisco, California.

Juanita O. Hatch and American Trust Company are duly appointed Executrix and Executor, respectively, of the last Will of Herbert B. Hatch, by authority of letters testamentary issued by the Superior Court of the County of San Joaquin, State of California.

The places of residence of each Petitioner and the office of said Collector were, and are, within the territorial jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The Respondent on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States.

## II.

## Prior Proceedings

On February 20, 1948, the Commissioner of Internal Revenue determined a deficiency in Federal Income Tax against Herbert B. Hatch, deceased, for the taxable year from January 1, 1944, to April 9, 1944, in the amount of \$3,702.31; against Petitioner Juanita O. Hatch for the taxable year ended December 31, 1944, in the amount of \$2,199.38; and against Petitioner Herbert B. Hatch, Jr., for the taxable year ended December 31, 1944, in the amount of \$187.22, and sent a deficiency notice by registered mail to Petitioners, in accordance with the applicable provisions of the Internal Revenue Code.

Thereafter, each Petitioner on review duly and timely filed with the Tax Court of the United States appeals from the said determination of the Commissioner of Internal Revenue, and the Commissioner duly filed his answers to said Petitions, for Redetermination of the Deficiency. On joint motion therefor, the cases were thereafter consolidated for hearing and briefing, and were tried by the Tax Court of the United States on May 10, 1949, before the Honorable Ernest H. Van Fossan at San Francisco, California. All facts were stipulated on the trial and briefs were submitted by the parties.

On February 23, 1950, the Tax Court of the United States promulgated its Opinion in the proceedings, pursuant to which decision was entered on February 24, 1950.

On May 19, 1950, the Tax Court vacated the Decision for the proceedings, Docket Nos. 18482, 18483 and 18485, by grant of the petitioners' joint motion, upon a showing that the Executor and Executrix in the related proceeding at Docket No. 18482 had been discharged prior to the date of the decisions in these proceedings. A proper certificate was filed on December 19, 1950, in the proceeding at Docket No. 18482 showing that the Executor and Executrix had been again appointed and qualified.

On December 28, 1950, the Tax Court entered its Decisions that deficiencies in income tax were due as follows: Estate of Herbert B. Hatch, deceased; Juanita O. Hatch, Executrix, and American Trust Co., Executor, \$3,702.31 for the period January 1 to April 9, 1949; Juanita O. Hatch, \$2,199.38 for the year 1944, and Herbert B. Hatch, Jr., \$187.22 for the year 1944.

### Nature of the Controversy

The question presented to the Tax Court of the United States was whether the Petitioners, as co-partners, sold their interests in the partnership known as Hatch Chevrolet Company, and hence, whether the income realized from such sale was taxable to them individually as income from the sale of capital assets under Section 117 of the Internal Revenue Code (26 U.S.C., Sec. 117). Petitioners so reported their respective shares of the gain realized on the sale and paid a tax on 50% thereof.

Respondent determined that the transaction was

the sale of assets of the partnership and that some of the assets sold were not capital assets, and hence that 100% of the income realized from the sale of some of such assets was taxable to each of the partners as ordinary income.

On December 1, 1942, Herbert B. Hatch, now deceased; Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., their son, all of Stockton, California, entered into a written agreement of co-partnership to engage in the business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts, both at wholesale and retail. The partnership operated as Hatch Chevrolet Co., under a franchise from the Chevrolet Motor Division, General Motors Corporation.

On February 16, 1944, an agreement was entered into between Herbert Brooks Hatch, Juanita Osborn Hatch and Herbert B. Hatch, Jr., as co-partners, as parties of the first part, and King M. Chase, party of the second part, by which the Hatches agreed to sell their interests in the partnership to Chase for the tentative sale price of \$175,229.51. Chase paid \$5,000.00 at the time of the agreement of sale and the transaction was escrowed until a complete inventory and appraisement could be taken. The financial statement attached to the agreement was not a financial statement of the partnership, but set up the tentative basis for determining the overall sales and purchase price, and did not include cash in bank, two automobiles and certain liabilities. On March 3, 1944, the partners delivered a bill of sale to Chase in which the con-

sideration was recited as \$161,807.77. Chase paid the balance due of \$156,807.77 by check dated March 3, 1944, to Herbert B. Hatch, Juanita O. Hatch and Herbert B. Hatch, Jr., co-partners.

The interests of the partners in the partnership which were sold to Chase had a total cost basis of \$125,138.70 and the gain on the sale was \$36,769.07. The assets of the partnership which were sold to Chase were not distributed in kind to the co-partners prior to the sale thereof. By checks drawn on the partnership account after June, 1944, proceeds of the sale were paid to the Estate of Herbert B. Hatch and to Juanita O. Hatch and Herbert B. Hatch, Jr.

Herbert B. Hatch died a resident of Stockton, California, on April 9, 1944, and Juanita O. Hatch and American Trust Co. were appointed Executrix and Executor, respectively, under his Last Will and Testament.

By an amended information return (Form 1065) for the fiscal year beginning July 1, 1943, and ending June 30, 1944, filed with the Collector of Internal Revenue for the First District of California on September 19, 1944, Hatch Chevrolet Co. reported ordinary net income of \$75,444.43 and a long-term capital gain, resulting from the sale of the business, of \$36,669.07. The income thus reported was allocated on the partnership return to the individual partners in proportion to their individual interests in the partnership.

An individual income tax return for the period beginning January 1, 1944, and ending April 9, 1944

(the date of death of Herbert B. Hatch), was filed by the Executors of the Estate of Herbert B. Hatch with the Collector of Internal Revenue for the First District of California on March 3, 1945. The return reported the decedent's share of the ordinary income of Hatch Chevrolet Co. in the amount of \$42,337.04 and a long-term capital gain of \$9,778.42, one-half of his proportionate share of the capital gain realized in the sale of the partnership interests.

Juanita O. Hatch by an individual income tax return for the year 1944 filed with the Collector of Internal Revenue for the First District of California on January 15, 1945, reported ordinary income from the partnership of Hatch Chevrolet Co. in the amount of \$27,431.85, and a long-term capital gain of \$7,089.35, one-half of her proportionate share of the capital gain realized in the sale of the partnership interests.

Herbert B. Hatch, Jr., by an individual income tax return for the year 1944, filed with the Collector of Internal Revenue for the First District of California on February 26, 1945, reported ordinary income from the partnership in the amount of \$5,675.54, and a long-term capital gain of \$1,466.77, one-half of his proportionate share of the capital gain realized in the sale of the partnership interests.

Respondent Commissioner, in the deficiency notices dated February 20, 1948, held that the transaction between the Petitioners and Chase constituted a sale by the partnership of assets held pursuant to its business and that Accounts Receivable and Inventories of New and Used Cars, Parts, Acces-



sories, Tires and Tubes and Miscellaneous Inventories were not capital assets under Section 117 of the Internal Revenue Code, and, therefore, that the gain realized thereon was not a long-term capital gain. Consequently, each of the Petitioners was charged by Respondent with a deficiency based on his failure to report and pay the tax on 100% of his share of the proceeds of the sale of these assets as ordinary income.

The Tax Court agreed with the determination of the Respondent, and in so doing erred:

1. In holding and deciding that the partners made no effort to sell, and Chase did not buy their individual interests in the partnership or any part of those interests.

2. In holding and deciding that the subject of the sale to Chase was merely a part of the partnership assets subject to a part of the partnership liabilities.

3. In holding and deciding that because the partnership distributed to the individual partners some of its assets and the amount realized from the sale, the gain realized from the sale should not be taxed to the partners as capital gains resulting from the sale of their partnership interests.

4. In holding and deciding that the gain was computed on the partnership return as a gain from a sale by the partnership of some of its assets, and that the part of the gain resulting from the sale

of assets which were not capital assets of the partnership, was ordinary income.

5. In holding and deciding that there is no method for Federal tax purposes of computing a capital gain to a partner for his partnership interest where the sale of the partnership interest involves some, but not all, of the partnership assets.

6. In failing to find, hold and decide that the sale to Chase of the assets of the partnership as a going business was not a sale by the partnership in the ordinary course of its business, but a sale by the individual Petitioners of their individual interests in the partnership, which were capital assets.

7. In that its opinion and decision are contrary to the uncontroverted evidence in this proceeding.

8. In that its opinion and decision in this proceeding are contrary to law.

Wherefore, Petitioners petition that the decision of the Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Respectfully submitted,

/s/ FREDERIC D. DASSORI,

Counsel for Petitioners on  
Review.

City of Washington,  
District of Columbia—ss.

Frederic D. Dassori, being first duly sworn, deposes and says that he is one of the attorneys of record for the Estate of Herbert B. Hatch, Juanita O. Hatch, Executrix, and American Trust Co., Executor, and for Juanita O. Hatch and Herbert B. Hatch, Jr., Petitioners in the foregoing Petition for Review, and that he has read said Petition and is familiar with the contents thereof; that said Petition is true of his own knowledge, except as to matters therein alleged upon information and belief and that as to these matters, he believes them to be true.

FREDERIC D. DASSORI.

Subscribed and sworn to before me, this 21st day of March, 1951.

[Seal]      /s/ ETHNA WHITE,  
Notary Public.

My commission expires Feb. 15, 1956.

Filed T.C.U.S. March 23, 1951.

United States Court of Appeals for the  
Ninth Circuit

T. C. Docket Nos. 18482, 18483, and 18485.

[Title of Causes.]

## NOTICE OF FILING PETITION ON REVIEW

To: Charles Oliphant, Esquire, Chief Counsel,  
Bureau of Internal Revenue, Internal Revenue  
Building, Washington, D. C., Attorney for Re-  
spondent on Review.

You are hereby notified that the Estate of Herbert B. Hatch, Deceased, Juanita O. Hatch, Executrix, and American Trust Co., Executor; Juanita O. Hatch and Herbert B. Hatch, Jr., did on the 23rd day of March, 1951, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above styled causes. A copy of the petition for review, as filed, is hereto attached and served upon you.

Dated this 23rd day of March, 1951.

/s/ FREDERIC D. DASSORI,  
Counsel for Petitioners on  
Review.

Receipt of Copy acknowledged.

Filed T.C.U.S. March 23, 1951.

United States Court of Appeals for the  
Ninth Circuit

T. C. Docket Nos. 18482, 18483, and 18485

[Title of Causes.]

STIPULATION FOR CONSOLIDATION ON  
PETITION FOR REVIEW

The above-named petitioners and the respondent, each acting by and through their respective attorneys of record, hereby stipulate and agree as follows:

The above-styled and numbered causes shall be, and they are hereby, consolidated for the purposes of a review by the United States Court of Appeals for the Ninth Circuit of the decisions heretofore entered by the Tax Court of the United States in said causes, said review being taken at the instance of the petitioners. In all of the proceedings which the petitioners may take to obtain a review of said decisions, they may proceed as if there were only one cause and join said causes in one petition for review, and only one record, which record shall embrace all of the pertinent proceedings had in said consolidated causes.

This agreement and stipulation is entered into because said causes were consolidated for hearing and decision before the Tax Court of the United States and because said petitioners in Dockets Nos. 18483 and 18485 are mother and son, and the petitioner in Docket No. 18482 is the estate of their husband and father, all of the State of California,

and because said causes involve the same transaction and because the same proceedings and evidence in one of said causes is equally applicable to and pertinent to the others, and because said causes were disposed of by the Tax Court of the United States in one opinion.

Executed on behalf of the above-named parties by their attorneys of record this 23rd day of March, 1951.

/s/ FREDERIC D. DASSORI,  
Attorney for Petitioners.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Filed T.C.U.S. March 23, 1951.

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In the United States Court of Appeals for the  
Ninth Circuit

T. C. Docket Nos. 18482, 18483, and 18485

[Title of Causes.]

### PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled causes, in connection with the Petition for

Review by the said Court of Appeals for the Ninth Circuit, heretofore filed by the petitioners above named:

(1) Docket entries of the proceedings before the Tax Court of the United States.

(2) Pleadings in each of the above causes:

(a) Petition.

(b) Answer to Petition.

(3) Stipulation of Facts and Exhibits 1-A, 2-B, 3-C, 4-D and 5-E appended thereto.

(4) Opinion of the Tax Court promulgated February 23, 1950.

(5) Decisions of the Tax Court of the United States entered December 28, 1950.

(6) Petition for Review and Assignment of Error, together with Notice of Filing Petition on Review containing proof of service.

(7) Stipulation of the parties for consolidation on review.

(8) This praecipe.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

/s/ FREDERIC D. DASSORI,

Counsel for Petitioner on  
Review.

Receipt of Copy acknowledged.

Filed T.C.U.S. May 1, 1951.

The Tax Court of the United States

Docket Nos. 18482 18483, and 18485

[Title of Causes.]

## ORDER ENLARGING TIME

Upon motion of counsel for petitioner to which respondent interposes no objection, it is

Ordered that the time for preparation, transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Court of Appeals for the Ninth Circuit is extended to June 21, 1951.

[Seal]      /s/ JOHN W. KERN,  
Chief Judge.

Dated: Washington, D. C., May 2, 1951.

Served May 4, 1951.

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The Tax Court of the United States

Docket Nos. 18482, 18483, and 18485

[Title of Causes.]

## CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 19, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the Praecipe for



Record on Review in the proceedings before The Tax Court of the United States entitled, "Estate of Herbert B. Hatch, Dec'd., Juanita O. Hatch, Executrix, and American Trust Co., Executor, Petitioners, v. Commissioner of Internal Revenue, Respondent," Docket No. 18482; "Juanita O. Hatch, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 18483 and "Herbert B. Hatch, Jr., Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 18485 and in which the petitioners in The Tax Court of the United States proceeding have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of May, 1951.

[Seal]      /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the  
United States.

[Endorsed]: No. 12928. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Herbert B. Hatch, deceased, Juanita O. Hatch, Executrix and American Trust Company, Executor; Juanita O. Hatch and Herbert B. Hatch, Jr., Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed May 14, 1951.

PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals for the  
Ninth Circuit

No. 12928

[Title of Cause.]

DESIGNATION AS TO PRINTING RECORD

Come Now the parties, by their attorney of record, and pursuant to Rule 19(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, respectfully request that the entire record, as transmitted by the Clerk of the Tax Court, be printed in this case.

Respectfully submitted,

/s/ FREDERIC D. DASSORI,  
Attorney for Petitioners.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.

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United States Court of Appeals  
for the Ninth Circuit

No. 12928

[Title of Cause.]

STATEMENT OF POINTS

Come Now the petitioners herein, by their attorney, Frederic D. Dassori, and hereby assert the following errors, which they intend to urge on review by the United States Court of Appeals for

the Ninth Circuit of the decisions of the Tax Court of the United States rendered in petitioners' causes in Tax Court Docket Numbers 18482, 18483 and 18485, on December 28, 1950:

1. The Tax Court erred in holding and deciding that petitioners, as co-partners, made no effort to sell, and King M. Chase did not buy their individual interests in the partnership or any part of those interests.

2. The Tax Court erred in holding and deciding that the subject of the sale to Chase was merely a part of the partnership assets subject to a part of the partnership liabilities.

3. The Tax Court erred in holding and deciding that the partnership distributed to the individual partners some of its assets and the amount realized from the sale, and the gain realized from the sale should not be taxed to the partners as capital gain resulting from the sale of their partnership interests.

4. The Tax Court erred in holding and deciding that the gain was computed on the partnership returns as a gain from a sale by the partnership of some of its assets, and that the part of the gain resulting from the sale of assets which were not capital assets of the partnership, was ordinary income.

5. The Tax Court erred in holding and deciding that there is no method for Federal Tax purposes of computing a capital gain to a partner for his

partnership interest where the sale of the partnership interest involves some, but not all of the partnership assets.

6. The Tax Court erred in failing to find, hold and decide that the sale to Chase of the assets of the partnership as a going business was not a sale by the partnership in the ordinary course of its business, but a sale by the individual petitioners of their individual interests in the partnership, which were capital assets.

7. The Tax Court erred in that its opinion and decisions are contrary to the uncontroverted evidence in these proceedings.

8. The Tax Court erred in that its opinion and decisions in these proceedings are contrary to law.

Respectfully submitted,

FREDERIC D. DASSORI,  
Attorney for Petitioners.

Service of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.



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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 12928

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ESTATE OF HERBERT B. HATCH, *Deceased*, Juanita O. Hatch,  
Executrix and American Trust Company, Executor;  
JUANITA O. HATCH and HERBERT B. HATCH, JR., *Peti-*  
*tioners,*

VS.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

---

On Petition to Review a Decision of the Tax Court  
of the United States.

---

## BRIEF FOR PETITIONERS.

---

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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 12928

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ESTATE OF HERBERT B. HATCH, *Deceased*, Juanita O. Hatch,  
Executrix and American Trust Company, Executor;  
JUANITA O. HATCH and HERBERT B. HATCH, JR., *Peti-  
tioners*,

VS.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

---

On Petition to Review a Decision of the Tax Court  
of the United States.

---

## BRIEF FOR PETITIONERS. JURISDICTION.

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This petition for review (R. 78-87) involves alleged deficiencies in Federal Income taxes against (1) Herbert B. Hatch, now deceased, for the taxable year from January 1, 1944, to April 9, 1944, in the amount of \$3,702.31; (2) Juanita O. Hatch for the taxable year ending December 31, 1944, in the amount of \$2,199.38; and Herbert B.

Hatch, Jr., for the taxable year ending December 31, 1944, in the amount of \$187.22. On February 20, 1948, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiencies in the respective amounts above set forth. (R. 14, 24, 34) Within ninety days thereafter, on May 17, 1948, the taxpayers filed their respective petitions with the Tax Court for a redetermination of those deficiencies (R. 3-38) under the provisions of Section 272 of the Internal Revenue Code. The petitions were consolidated for hearing before that Court (R. 4, 6, 8). The decisions of the Tax Court sustaining the said deficiencies were entered December 28, 1950 (R. 75, 76, 77). The cases were brought to this Court by a petition for review filed March 23, 1951 (R. 78-87), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, (28 U.S.C. Sections 1141, 1142) and by stipulation (R. 89-90) were consolidated for purposes of review herein.

### **VENUE.**

Herbert B. Hatch, deceased, and Petitioners Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., their son, were residents of Stockton, California, in 1944 and their Federal Income Tax returns for 1944 were filed with the Collector of Internal Revenue for the First District of California at San Francisco, California. (R. 10, 11, 21, 31)

Juanita O. Hatch and American Trust Company were and are duly appointed Executrix and Executor, respectively, of the last Will of Herbert B. Hatch, by authority of letters testamentary issued by the Superior Court of the County of San Joaquin, State of California. (R. 4, 10, 71, 79, 81)

The places of residence of each petitioner and the office of the said Collector were and are within the territorial jurisdiction of the United States Court of Appeals for the Ninth Circuit. (R. 10, 21, 31)

The Respondent on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States. (R. 79)

### STATEMENT OF THE CASE.

This case was tried in the Tax Court of the United States on stipulated facts. (R. 40)

On December 1, 1942, in Stockton, California, Herbert B. Hatch, now deceased, Juanita O. Hatch, his wife, and Herbert B. Hatch, Jr., their son, entered into a written agreement of co-partnership to engage in "the business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts"(R. 45, 46) under a franchise from the Chevrolet Motor Division, General Motors Corporation.

The original co-partnership assets were those received on liquidation of Hatch Chevrolet Company, a corporation. They constituted the capital contribution to the partnership of each co-partner's undivided interest in those assets as follows:

Herbert B. Hatch	40/75ths	
Juanita O. Hatch	29/75ths	
Herbert B. Hatch, Jr.	6/75ths	(R. 46)

The interests of all parties in the partnership remained the same throughout the duration of the partnership.

Herbert B. Hatch, Jr., was a member of the United States Army Air Corps on October 9, 1942 and on that date executed a general power of attorney to his father, Herbert B. Hatch. (R. 41)

On February 16, 1944, Petitioners as co-partners agreed to sell to King Chase their interests or the assets of the partnership (as the Court may determine), (R. 51), the transaction to be escrowed until an inventory and appraisal could be made to determine the value of the interests or assets of the partnership (as the Court may determine). (R. 52) The Agreement (R. 51) further

provided, however, that the purchaser "shall take over possession of the physical assets of the business at 8 o'clock a.m. on Monday, February 21, 1944, and thence forward shall operate said business to all intents and purposes as though this transaction had been completed and title thereto passed to the" purchaser. (R. 52)

"Upon taking possession", the purchaser was given "permission to *operate the business under the name of Hatch Chevrolet Company* for a limited period of time to enable him to make the necessary arrangements for the future title or trade name of said business." (R. 52) (Emphasis supplied)

Subsequently, on March 3, 1944, the Petitioners "as co-partners" executed a bill of sale to the said purchaser pursuant to the terms of the said agreement of sale which was referred to and made a part thereof. (R. 56, 57)

The following assets and liabilities were excluded from the sale: (1) cash in bank in the amount of \$35,249.90, (2) two automobiles having a book value of \$1,542.66, (3) certain liabilities, in the amount of \$15,588.55, not assumed by the purchaser (R. 42).

At the time of the execution of the Agreement of Sale on February 16, 1944, Chase paid \$5,000.00 of the purchase price (R. 41) and at the time of the execution of the Bill of Sale on March 3, 1944, Chase paid the remainder of the purchase price in the amount of \$161,807.77. (R. 42) This latter payment was made by check payable to the order of the Hatches, "Co-partners", and was deposited in the bank account of the Hatches "Co-partners". (R. 60) Partial distributions were made to the petitioners beginning in June 1944 (R. 43). \$5,000.00 was withheld by Chase as a reserve against bad debts and was subsequently refunded by him. (R. 42)

In the transaction between the parties there was never any distribution of assets in kind to the partners prior to the sale. (R. 42)

The total cost basis to the partners of the interests of the partners or the assets (as the Court may determine)

which were transferred was \$125,138.70 and the gain on the sale was \$36,669.07. (R. 42)

Herbert B. Hatch died on April 9, 1944, and his wife and the American Trust Company were appointed Executors of his estate. (R. 4, 10, 42, 71)

An amended partnership information return of income (Form 1065) for the fiscal year beginning July 1, 1943, and ending June 30, 1944, was filed by the Hatch Chevrolet Company with the Collector of Internal Revenue for the First District of California on September 19, 1944 (R. 43). The amended return reported an ordinary net income in the amount of \$75,444.43 and a long term capital gain from sale of business in the amount of \$36,669.07, \$18,334.54 of which was to be taken into account. In Schedule J of said amended return the partnership reported the partners' shares of income and credits in proportion to their individual interests in the partnership as follows: (R. 43)

	<i>Ordinary Income</i>	<i>Long Term Capital Gains</i>	<i>Charitable. Contributions</i>
H. B. Hatch	\$42,337.04	\$ 9,778.42	\$213.33
Juanita O.Hatch	27,431.85	7,089.35	154.67
H. B. Hatch, Jr.	5,675.54	1,466.77	32.00
	<hr/>	<hr/>	<hr/>
	\$775,444.43	\$18,334.54	\$400.00

Petitioners duly filed their respective individual income tax returns and therein claimed long term capital gains in the amounts shown in the amended partnership information return above set forth. (R. 44)

Respondent challenged the treatment of the sale and allowed a long term capital gain in the amount of \$22,-486.36 (recognized to the extent of \$11,243.18), determined that the gain from the sale in the amount of \$14,-182.71 was ordinary income from the sale of the property other than capital assets, and made corresponding proportionate adjustments in the individual incomes of the partners on the ground that the transaction constituted

a sale by the partnership of assets held pursuant to its business and that a portion of the net gain realized thereon was reportable as ordinary income. (R. 16-19, 26-29, 36-38)

Petitioners each petitioned the Tax Court for a redetermination of the alleged deficiency and after a hearing, that Court, on February 23, 1950, rendered an opinion (R. 67) which sustained the Respondent. On December 28, 1950, an order was entered by the Court in accordance with said opinion (R. 75, 76, 77).

### **SPECIFICATION OF ERRORS.**

The Court erred:

1. In holding and deciding that the partners made no effort to sell, and Chase did not buy their individual interests in the partnership or any part of those interests. (R. 85)

2. In holding and deciding that the subject of the sale to Chase was merely a part of the partnership assets subject to a part of the partnership liabilities. (R. 85)

3. In holding and deciding that because the partnership distributed to the individual partners some of its assets and the amount realized from the sale, the gain realized from the sale should not be taxed to the partners as capital gain resulting from the sale of their partnership interests. (R. 85)

4. In holding and deciding that the gain was computed on the partnership return as a gain from a sale by the partnership of some of its assets, and that the part of the gain resulting from the sale of assets which were not capital assets of the partnership, was ordinary income. (R. 85)

5. In holding and deciding that there is no method for Federal tax purposes of computing a capital gain to a partner for his partnership interest where the sale of the



partnership interest involves some, but not all of the partnership assets. (R. 86)

6. In failing to find, hold and decide that the sale to Chase of the assets of the partnership as a going business was not a sale by the partnership in the ordinary course of its business, but a sale by the individual Petitioners of their individual interests in the partnership, which were capital assets. (R. 86)

7. In that its opinion and decision are contrary to the uncontroverted evidence in this proceeding. (R. 86)

8. In that its opinion and decision in this proceeding are contrary to law. (R. 86)

### **SUMMARY OF ARGUMENT.**

1.)The sale by the partners was a sale of each partner's interest in the partnership.

(a) The transaction was in substance and effect a sale of the partnership interests.

(b) The exclusion of certain assets and liabilities from the sale did not preclude the transaction from being a sale of partnership interests.

(c) The sale terminated the partnership and that which transpired after the sale was not the conduct of business but was incident to the distribution between Petitioners of the proceeds of the sale or in aid thereof.

2) The profit from the sale is taxable to the individual partners as capital gain.

**ARGUMENT.****I****The Sale by the Partners Was a Sale of Each Partner's Interest in the Partnership.**

The stipulated facts and the Exhibits in support thereof (R. 40-66) submitted in this case admit of only one logical construction in regard to the intention of the parties to the agreement of sale. This intent was clearly a sale of the interests of the three partners in the partnership business and a merger of those interests in the purchaser.

Everything done by the parties in consummation of the sale and in distribution of the proceeds of the sale to the former partners was consistent with this intention.

The Tax Court's construction is contrary to the facts and clearly erroneous as a matter of law.

**(a) The transaction was in substance and effect a sale of the partnership interests.**

Prior to the sale transaction in question, on December 1, 1942, the three Petitioners entered into a partnership agreement, as co-partners, for the purpose of operating an automobile dealership (R. 45-51). The capital contribution to the partnership of each co-partner was his undivided interest in the assets of a liquidated corporation (R. 46).

On February 16, 1944, the same three Petitioners entered into an agreement of sale with King M. Chase. They agreed to sell and Chase agreed to buy "all of the business and assets of HATCH CHEVROLET COMPANY, a co-partnership, hereinafter listed," escrowing the transaction until a final inventory to determine the value of the interests. However, they agreed to give Chase possession of the physical assets of the business within five days as if the transaction had been completed, and permitted him to operate the business under the name of Hatch Chevrolet Company until he had arranged for a trade name (R.

51-55). On March 3, 1944, after Chase had taken over the business, the three Petitioners executed a Bill of Sale, (R. 56-59) conveying to Chase all of the assets of the Hatch Chevrolet Company, with the exception of cash in bank, two automobiles, and certain liabilities.

Everything else necessary to conduct the business for which the partnership had been formed (with the exception of the franchise from Chevrolet Division, General Motors Corporation, which was not transferable) was transferred to the Buyer.

The legal nature of the subject matter of the sale permits no logical conclusion other than that the partnership interests were transferred.

The articles of partnership were entered into, and the contract of sale was made and executed, in the State of California. The applicable law as to the respective rights of the several partners is therefore the law of California. (*Estate of Daniel Gartling v. Commissioner*, Docket No. 8795—T. C. Memo 1947, aff'd 170 F. (2d) 73; *Lehman v. Commissioner*, 7 T. C. 1088, aff'd. 165 F. (2d) 383; *Blair v. Commissioner*, 31 B. T. A. 1192, rev'd. 90 F. (2d) 1004, rev'd. 300 U. S. 5).

The State of California adopted the Uniform Partnership Act on August 14, 1929. (California Civil Code Sections 2395 et seq.)

It is elementary that the assets of the partnership are the property of the firm and that the partners have no individual property rights therein. This was well stated by Judge Learned Hand in *Commissioner of Internal Revenue v. Lehman*, 165 F. 2d. 383, where, after reviewing the development of partnership concepts in the common law, he said:

“The Uniform Partnership Law codified this congeries of rights and obligations as it had developed; and made no substantial change, when it declared in so many words that ‘a partner’s interest in the partnership is his share of the profits and surplus.’ (Sec. 52, New York Partnership Law, Consol. Laws, c. 39)”

The section of the Uniform Act to which reference is made is contained in the California Civil Code as Section 2420 and reads:

“Nature of Partner’s Interest in Partnership. A partner’s interest in the partnership is his share of the profits and surplus, and the same is personal property.”

In *Clarke v. Kiedler*, 113 P. 2d 275, 44 Cal. App. 2d 838, the court construed the statute as declaratory of the common law and to mean that the interest of one partner in the assets of the partnership does not entitle him to any particular portion of such assets, but merely confers upon him a right to an account with other members of the partnership and when the affairs of the partnership are settled to receive the share to which he is entitled.

In fact an assignment by a partner of all of his interest in the partnership does not create the assignee a partner with the other partners nor vest in him title to any specific partnership property. Such assignment “merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled”. (California Civil Code Section 2421)

When the entire sale transaction is analysed it is to be remembered that the substance and effect of the transaction, rather than its form, is the appropriate test has been uniformly recognized by the courts. In *United States v. Phillis*, 257 U. S. 156, 168, 42 S. Ct. 63, 65, the rule was stated as follows:

“We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases besides those just cited we have under varying conditions followed the rule. *Lynch v. Turrish*, 247 U. S. 221; *Southern Pacific Company v. Lowe*, 247 U. S. 330; *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71”.

In *Paxson v. Commissioner of Internal Revenue*, 3 Cir. 144 F. 2d 772, 776, it is said:

“Taxation deals with realities not semblances; with substance not form. As we stated in *Berwind v. Commissioner of Internal Revenue*, 3 Cir., 137 F. 2d 451, 453, ‘It is a well settled rule of tax law that the substance of transactions will prevail over form, \* \* \*’. The basis of the doctrine is the common-sense view that taxation ‘is an intensely practical matter.’ ”

These were the views expounded and followed in *Thornley v. Commissioner of Internal Revenue*, 3 Cir., 147 F. 2d 416, in holding that an exchange was a transfer of partnership interests and not of partnership assets. The similarity between the *Thornley* case, *supra*, and the instant case deserves attention.

The taxpayer, Thornley, was a member of a partnership formed in 1927 to engage in the advertising business. In 1929, the partners decided to incorporate. They executed a bill of sale to the corporation wherein the five partners, describing themselves as “co-partners trading as N. W. Ayer & Son” (just as the petitioners in the instant case described themselves in their Bill of Sale as “co-partners transacting business under the firm name and style of Hatch Chevrolet Company”) (R. 56).

Whereas the contract of sale in the *Thornley* case purported to convey “all assets and property of the partnership”, there was nevertheless excluded from the transfer the undistributed profits which were standing to the credit of the respective partners on the partnership books (just as there was exempt from transfer in the instant case, the cash on hand and certain other minor assets (R. 42)).

The Commissioner contended in that case, as in this, that the partners had conveyed to the corporation the assets of the partnership and not their individual partnership interests in the partnership. The decision of the Tax Court sustaining the Commissioner (*Thornley v. Commissioner*, 2 T. C. 220) was reversed by the Court of Appeals, Third circuit.

That Court stated that “\* \* \* it is clear that the subject matter of the direct exchange between the partnership and the corporation was the partnership interest in the entire business and its physical assets, real and personal *as a going concern*” (emphasis supplied).

In the instant case the transfer was of the business “as a going concern”. This is clearly evidenced by the provisions of the Contract of Sale that the purchaser should “take over possession of the physical assets of the business at 8 o’clock a. m. on Monday, February 21, 1944, and thence forward *shall operate said business* \* \* \*” (R. 52) (Emphasis supplied). Such intent is further evidenced by the provision of the Bill of Sale that the purchaser should “upon taking possession, have permission *to operate the business* \* \* \*” (R. 52) (Emphasis supplied). The Contract of Sale refers to the “sales price of *said business* \* \* \*” (R. 52) (Emphasis supplied). It is further evidenced by the provision of the sales contract requiring the purchaser to indemnify and save harmless the former partners “from any obligation, liabilities or detriment whatsoever” that might accrue to them “during the period that said party *operates said business* under the firm, name and style of Hatch Chevrolet Company” (R. 54) (Emphasis supplied).

After citing *United States v. Phillis*, supra, *Tex-Penn Oil Company v. Commissioner*, 83 F. 2nd 518, aff’d 300 U. S. 481, and *Paxson v. Commissioner*, supra, to the effect that in cases of this character courts must look to the substance of the transaction, the court in the *Thornley* case continued:

“The critical test is not whether the corporation technically acquired the ‘partnership interest’ but, as was pointed out in *Kessler v. United States*, supra, *whether the petitioner gave up ‘his partnership interest in exchange for the stock even though that interest as such did not pass to the corporation’*. Here clearly the petitioner and his co-partners acting in concert gave up his partnership interest in exchange for the stock of the corporation” P. 422, (Emphasis supplied by the Court).

It would be difficult to find more apt language to characterize the situation presented in the instant case. The Tax Court opinion makes no reference to the *Thornley* case. In fact, the Court did not cite any authority for its conclusion on the main point involved.

It might also be noted that the Tax Court in reaching its conclusion refers to the fact that the partnership made a return showing the fact of sale. Without pausing to emphasize that a partnership return is merely an information return and that a partnership is not a tax paying entity, it is to be noted that the record states that "In said amended return the partnership reported an ordinary net income in the amount of \$75,444.43 and a long-term capital gain *from sale of business* in the amount of \$36,669.07, \$18,334.54 of which was to be taken into account" (R. 43) (Emphasis supplied).

The Tax Court opinion disregards the emphasized language and erroneously states "However, the gain was computed on a partnership return as a gain from a *sale* by the partnership of *some of its assets* \* \* \*" (R. 73) (Emphasis supplied).

The amended partnership return reveals further evidence of the intent of the partners and is indeed striking evidence of the "substance and effect" of the transaction.

Since the Commissioner of Internal Revenue in an opinion of May 17, 1950, (footnote post page 22), concedes that "the overwhelming weight of authority is contrary to the position heretofore taken by the Bureau viz, that the sale of a partnership interest is a sale of the selling partner's undivided interest in each partnership asset", petitioner will not labor the point but adopts the cases well cited in the Commissioner's opinion:

*Estate of Daniel Gartling v. Commissioner*, Docket No. 8795, T. C. Memo 1947, aff'd. 170 F. 2d 73

*Ford v. Commissioner*, 6 T. C. 499

*Humphrey v. Commissioner*, 32 B.T.A. 280

*Lehman v. Commissioner*, 7 T. C. 1088, Aff'd. 165 F. 2d 383, cert. denied 334 U. S. 119, 68 Sup. Ct. 1085

*Shapiro v. Commissoiner*, B. T. A. Memo Dec. 1940, Aff'd. 125 F. 2d 532

*Smith v. Commissioner*, 10 T. C. 398, Aff'd. 173 F. 2d 470, cert. denied 338 U. S. 818

*Thornley v. Commissioner*, 2 T. C. 200, Rev'd. 147 F. 2d 416

*Whitney v. Commissioner*, 8 T. C. 1019, Rev'd. 169 F. 2d 562, cert. denied 335 U. S. 892.

**(b) The exclusion of certain assets and liabilities from the sale did not preclude the transaction from being a sale of partnership interests.**

The Tax Court predicated its decision almost entirely upon the fact that certain partnership assets and liabilities were excluded from the sale. Such a determination is certainly contrary to that in the *Thornley* case supra, in which, under a similar sales contract, the exclusion of assets from the transfer did not prevent the sale from being that of the partnership interests.

Certain assets owned by the Hatch partnership and used in the business were retained by the sellers. These are stipulated to have been:

1. Cash in bank in the amount of \$35,249.90.
  2. Two automobiles having a book value of \$1,542.66
  3. Certain liabilities in the amount of \$15,588.55.
- (R. 42)

The Tax Court found that all of the assets of the partnership were transferred except:

1. The General Motors franchise.
2. Two automobiles.
3. Cash in a substantial amount.
4. The partnership name.

And that Chase assumed a part but not all of the liabilities. (R. 70)

The facts stipulated and the Tax Court additions are discussed separately.



(1) *Retained cash.* At the time the business was sold the partnership had cash to its credit in the bank.

To use this fact of excluding this cash from the sale as the basis of a conclusion that the partners did not sell, nor did the purchaser receive, the individual interests of the partners is completely unrealistic. Such a conclusion overlooks the fact that the transaction was a cash sale, as shown in the agreement of sale (R. 52), the bill of sale, and the actual payment of \$161,807.77 by the purchaser to the petitioners (R. 60).

It would be patently contrary to established commercial custom and usage for the purchaser to have "purchased" the cash in bank by the payment of an equal amount in cash. To have included this sum as a transferred asset would merely have resulted in adding an equivalent amount to the purchase price upon the receipt of which, both the vendors and the purchaser would have been in exactly the same position as the contract actually left them. Neither the purchaser nor the partners would have received or parted with one cent the more or less. This was a practical bookkeeping transaction and to seize upon it as having any evidentiary value is grasping at a straw.

(2) *Retained Automobiles.* To infer from the exclusion from the sale of two second hand automobiles that petitioners did not sell their partnership interests and intended to continue the conduct of a business which they had just sold is but another instance of straining at the proverbial gnat.

It can hardly be contended that the retention of these assets with a value of \$1,542.66 in a sale involving approximately \$160,000.00 is sufficient to continue the former partners "in the business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts both at wholesale and retail."

[Obviously, the two used automobiles were the automobiles used by the Petitioners for their personal use. Exclusion of these cars from the sale amounted in effect

to nothing more than Petitioners' purchase from the business, since the amount Petitioners received from the sale was reduced by the amount they would have to pay for these two cars.]

In the absence of a showing in the evidence and a finding by the court that the retention of the two used automobiles was for the purpose of continuing the partnership in business for its stated purpose, the conclusion, that because of this retention the partnership was not terminated, is illogical, unreasonable and unwarranted.

(3) *Retained Liabilities*: The retained liabilities were incurred by the partnership prior to the date of sale of the business, and as such, under common business practice, their exclusion from the transfer is perfectly consistent with the provision in the Bill of Sale that

“the parties of the First Part continue to hold and assume any and all liabilities arising from the operation of the Hatch Chevrolet Company prior to that hour and date [8 a.m. on Monday, February 21st, the date on which the purchaser had assumed control of the business under the Agreement of Sale] except such specific liabilities as have been assumed in writing by said Party of the Second Part.”

Those liabilities assumed by the purchaser under the Agreement of Sale included:

1. Accounts receivable, credit balances.
2. Service contract deposits.
3. Employer War Bonds.

Each of these items is in the nature of a *continuing liability* which would logically be expected to go with a continuing business, since the credit balances would probably be extinguished by further debit transactions with current customers; since service contract deposits carried an obligation to perform the services which the deposits guaranteed; and since the War Bonds would be possessed by the employees for whom they were purchased. The assump-

tion of all three evidences the discontinuance of the business by the Petitioners and its continuance by the Purchaser and does not preclude the transaction from being a sale of the partnership interests.

The exclusion of other liabilities incurred in the operation of the business prior to its transfer is perfectly consistent with the sale, since the Purchaser would not be expected to assume obligations incurred prior to his operation of the business as a single proprietorship and since, even if he did, it would be merely a question of his discharge of these liabilities for the Sellers and a consequent reduction of the purchase price by the amount he would have to pay for them.

Furthermore, the consent of the creditors would have to be secured for the substitution of debtors under established contract law. The Petitioners could not relieve themselves of liability by transferring the debts to another. Their retention of liability, therefore, was merely declaration of what devolved upon them by operation of law.

(4) *Retained Franchise*: The Tax Court evidently attached weight to the failure to transfer the General Motors franchise and the firm name as proving the retention of sufficient assets to continue the partnership in business.

The evidence introduced into the record is completely silent as to the disposition of the General Motors franchise. The only evidence of the existence of the franchise is a statement at the end of the Stipulation of Facts that prior to the date of sale, the Hatch Chevrolet Company operated its business under a franchise from the Chevrolet Motor Division, General Motors Corporation (R. 45).

The franchise was not mentioned in the Agreement of Sale (R. 51) or Bill of Sale (R. 56), nor was it stipulated to have been among the assets withheld from the sale (R. 40-45).

The Tax Court's determination, therefore, that it was an asset of the partnership which was not transferred is without value and without basis in the record.

(5) *Retention of firm name.* The agreement of sale provides: "Second party shall, upon taking possession, have permission to operate the business under the name of Hatch Chevrolet Company for a limited period of time to enable him to make the necessary arrangements for the future title or trade name of said business" (R. 52).

The fact that the sellers, as a part of the consideration of the sale, required that the existing firm name be discontinued in the future is in no conceivable way inconsistent with the sale of partnership interests. And, contrary to the determination of the Tax Court, the use of the existing firm name by the purchaser for any period of time is convincing evidence that the former partners did not in any way continue in the business for which the partnership was formed.

The "critical test" overlooked by the Tax Court is not what the partners retained but, as stated in *Thornley v. Commissioner* supra, "whether the petitioner gave up 'his partnership interest' ". The transaction was in substance and effect the sale of a partnership interest and the nature of the sale could not be altered merely because minor assets were withheld from the transaction.

**(c) The Sale Terminated the Partnership and That Which Transpired After the Sale Was Not the Conduct of Business But Was Incident to the Distribution Between Petitioners of the Proceeds of the Sale or in Aid Thereof.**

The Tax Court, in its opinion, first raised the issue of whether the partnership was terminated by the sale. The Court said:

"... the subject of the sale was a part of the partnership assets subject to a part of the partnership liabilities. *The partnership was not terminated* by the sale. It retained some of its assets and the amount realized from the sale. Later it distributed its assets to the individual partners in liquidation." (Emphasis supplied) (R 74)

This expression reveals that the Tax Court determined to characterize the sale as though assets subject to liabilities were sold to a customer in the ordinary course of business and that the partnership retained sufficient assets to remain in business as well as in existence.

Such a determination could result only from a misinterpretation of the facts and of the law. It is apparent that the Tax Court placed an unwarranted emphasis upon the fact that minor assets were retained by the former partners and that distribution to petitioners of the proceeds of the sale was required.

Under the Uniform Partnership Act, in force in California at the time the partnership was formed and at the time the partners sold their assets and business to Chase, a partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." (Calif. Civil Code, Sec. 2400(1).) The intention of the parties to carry on as co-owners a definite business is ultimately the test of partnership. WITKIN, *Summary of California Law* (6th ed.) p. 1259.

That test produces a negative result when applied to the association of these Petitioners after the sale to Chase. Having associated themselves to carry on as co-owners the business of selling, distributing, repairing and servicing motor vehicles and motor vehicle parts both at wholesale and retail, for profit, they divested themselves of their interests in this definite business. The sale resulted in the purchaser obtaining the complete inventory of new, used and service cars (with the exception of two used cars worth \$1,542.66 out of a total inventory of \$23,194.79), the complete inventories of parts, accessories, tires and other service materials, all work in process, the machinery, shop and service equipment, furniture and fixtures, all other fixed assets, and in addition, the firm name to be used by the purchaser for an indefinite period of time.

Petitioners retired from the business of selling, distributing, repairing and servicing motor vehicles and motor

vehicle parts, both at wholesale and retail under the firm name of Hatch Chevrolet Company.

What did they do thereafter?

There is no showing that they continued or resumed the business in which they had associated themselves to engage. The minor assets, withdrawn from the sale, as previously discussed herein, were not retained for the purpose of continuation of such business. Those assets were logically withheld to decrease the sales price of each partner's interest and for the convenience of both parties to the transaction.

Partnerships are terminated by the will of the partners—not by the mechanics of payment for their interest. Yet, in the instant case, it was the mechanics of distribution to petitioners of the proceeds of the sale which disturbed the Tax Court.

Subsequent to the sale, the Tax Court found the following transactions to have taken place:

(1) The purchaser's check was credited to the bank account of the Hatches, "Copartners."

(2) Partial distributions were made to them by checks drawn on that account beginning in June, 1944.

(3) The sale was reported and the gain computed on the partnership return for its fiscal year as a partnership transaction.

It is submitted that none of these things occurring after the sale to Chase vitiates the intention of the partners, expressed in the sale, to dispose of their partnership interests, but that all are consistent with that intention and were proper distributions of the proceeds of the sale or were in aid of such distribution.

The deposit and crediting of the check to the joint checking account of the Hatches, "co-partners," did not serve to effect a revival or a continuance of the partnership business—unless it be construed that the Hatches were in partnership to carry on the business of owning bank accounts

(although it would be difficult to add "for profit" which the definition of a partnership requires).

The holding of the former partners' joint bank account open to receive this final item of consideration and for the purpose of distributing the proceeds to petitioners was an expedient which in no way could alter the fact that the partners had ceased to own the business for which they had associated themselves.

The information contained on the partnership *information* return, as previously discussed herein, evidences the nature of the transaction described as the "sale of the business" (*supra* p. 13).

Petitioners contend that the transaction was the sale of partnership interests and termination of the partnership would result as a matter of law. Certainly dissolution by the "express will of all of the partners . . ." [California Civil Code, Section 2425(1)] resulted when all "co-partners transacting business under the firm name and style of Hatch Chevrolet Company" (R. 51) agreed to and did sell "all of the business and assets of Hatch Chevrolet Company" to one individual (R. 51).

It appears that the Tax Court in this case has confused "termination" of the partnership with the subsequent liquidation, between former partners, of their respective shares of the proceeds received from the sale of their partnership interests.

The distribution between petitioners of the proceeds of the sale did not alter the fact that the sale terminated the partnership.

## **(2) THE PROFIT FROM THE SALE IS TAXABLE TO THE INDIVIDUAL PARTNERS AS CAPITAL GAIN.**

It has been consistently held that the property right of a partner is an undivided interest in the partnership and that the interest which is his share in the profits and surplus after the partnership debts have been paid, is a capital asset. (*Lehman v. Commissioner*, *supra*; *Estate of Gart-*

ling, supra; *H. R. Smith v. Commissioner*, supra; *Thornley v. Commissioner*, supra.)

Each partner therefore holds his undivided interest in the partnership as a capital asset.

If a partner sells his interest to another party it is the sale of a capital asset. (*H. R. Smith v. Commissioner*, supra; *Estate of Gartling v. Commissioner*, supra; *Lehman v. Commissioner*, supra).

If a partner sells his interest to his co-partner it is the sale of a capital asset. (*Shapiro v. Commissioner*, 125 F. 2nd 532).

If a partner, in conjunction with his other partners sells his interest to a third party, then that sale is the sale of a capital asset. (*Thornley v. Commissioner*, 2 T. C. 220, rev'd 147 F (2d) 416)

From the time of the enactment of the Revenue Statute until May 17, 1950, the Commissioner of Internal Revenue contended that a sale of a partnership interest was a sale of the individual partner's undivided interest in each partnership asset. He persisted in that contention long after it had been uniformly rejected by the courts.

On May 17, 1950, the Bureau of Internal Revenue, in a memorandum of its General Counsel, finally conceded that his ruling that a sale of a partnership interest was not the sale of a capital asset under the provisions of Section 117 of the Internal Revenue Code was contrary to "the overwhelming weight of authority" and promulgated GMC 26379.\*\* The opinion then proceeds to attempt to distin-

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\*\* "An opinion is requested whether, for Federal income tax purposes, the Bureau should continue to treat a sale of a partnership interest as a sale of the selling partner's undivided interest in each specific partnership asset.

"The overwhelming weight of authority is contrary to the position heretofore taken by the Bureau, viz, that the sale of a partnership interest is a sale of the selling partner's undivided interest in each partnership asset. (See *Adam Kessler, Jr. v. United States*, 124 Fed. (2d) 152; *Commissioner v. Morris Shapiro*, 125 Fed. (2d) 532; *George H. Thornley et ux. v. Commissioner*, 147 Fed. (2d) 416; *Commissioner v. Estate of Daniel Gartling et al.*, 170 Fed. (2d) 73; *Commissioner v. Allan S. Lehman*, 165 Fed. (2d) 383, certiorari denied, 334 U. S. 819 (Report No. 96 of 5/17/48); *Commissioner v. H. R. Smith*, 173 Fed. (2d) 470 (Report No. 77 of 4/21/49) certiorari denied, October 10, 1949; *L. F. Long v. Commissioner*, 173 Fed. (2d) 471, certiorari denied, October 10, 1949 (Report No. 196 of 10/10/49); *Max Shapiro v. United States*, 83 Fed. Supp. 375; contra: *City Bank Farmers Trust Co. et al.*, (*Housman Will*) *v. United States*, 47 Fed. Supp. 98). See also *Robert E. Ford et al. v. Com-*



guish the instant case from the foregoing opinion "that the sale of a partnership interest should be treated as the sale of a capital asset under the provisions of Section 117 of the Internal Revenue Code" by stating that "the application of this rule should, of course, be limited to those cases in which the transaction in *substance and effect*, as distinguished from *form and appearance*, is essentially the sale of partnership interest. (See *Estate of Herbert B. Hatch et al. v. Commissioner*, 14 T.C. 251)." (Emphasis supplied)

The Commissioner thus very properly posed the issue here pending for decision which petitioners have argued throughout this brief.

Petitioners agree with the Commissioner that the form which the transaction took was the sale of partnership interests. They also submit that, even more than in the cases cited in the General Counsel's memorandum, the effect and the substance of the transaction was the sale of partnership interests.

There is no rational basis for the General Counsel's attempt to distinguish this case from the unbroken line of Tax Court and Circuit Courts of Appeals decisions holding against the Commissioner.

Perhaps the most concise discussion of the rationale of the case is to be found in *Lehman v. Commissioner*, supra, where the genesis of the so-called entity theory of partnerships is discussed by Judge Learned Hand.

He there concludes that, even prior to the Uniform Partnership Act, the law had long been established that "in the administration of its affairs it [a partnership] did become

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*missioner* (6 T.C. 499, acquiescence, C.B. 1946-2,2) (Report No. 241 of 12/5/46) wherein the court (consistent with the views expressed in the above-cited cases that a partnership interest is a capital asset and that gain or loss realized upon the sale of such an interest is capital gain or loss) held that the basis for computing gain or loss on an asset purchased by a partnership and sold after the retirement of one of the partners was the original cost of such asset when acquired by the firm.

"It is accordingly the opinion of this office that the sale of a partnership interest should be treated as the sale of a capital asset under the provisions of section 117 of the Internal Revenue Code . . ."

for most purposes an entity.” Rejecting the theory of the Court of Claims in the City Bank case, *supra*, and accepting that of *Thornley v. Commissioner*, *supra*, wherein the Third Circuit had held that several partnership interests were merged in a purchasing corporation.

The case at bar fits the rationale of these leading cases on the subject of taxation of the proceeds of the sale of a partnership interest and is not distinguishable in any essential characteristic from those cases.

To argue that the transaction was without reality, whereas it was real when the partners simply exchanged their ownership of the business for stock of an identical value, is to make a mockery of the words “substance and effect” and “form and appearance,” as applied to economic realities.

The essential thing in cases of this character is that the partner disposed of his ownership interest in a business, and thereafter did not draw the share of the profits to which that interest was entitled. The partners in *Thornley*, *supra*, sold their interest to the corporation and thereafter were no longer engaged in that business as partners. The partners in *Lehman*, *supra*, sold a part of their interests to new partners and no longer shared in the profits in the former proportion. *Smith*, *supra*, sold his interest to the remaining partners and withdrew from the business, receiving no more of the profits thereof.

This case is the same. After the date of the sale to Chase, there were no more profits from the business accruing to the partners—for there was no longer any partnership business to create a profit or a loss. The business was in Chase’s hands, and he alone or his assignee was entitled to the profits therefrom.

The former partners had retired from business for a profit on the date of the sale. They did not even have the use of the partnership name.

## CONCLUSION

There was no conflicting evidence to be resolved by the Tax Court. The case was heard on stipulation and written exhibits.

In *Thornley v. Commissioner*, supra, the court said “. . . the function of the Tax Court, *as of this court*, was to construe the nature of the transaction and such construction is a matter of law”. (Emphasis supplied).

It is respectfully submitted that the sale by the partners was the sale of partnership interests and, therefore, the decision of the Tax Court should be reversed.

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DEE R. BRAMWELL,  
*Counsel for Petitioners.*

## APPENDIX

### STATUTES INVOLVED

#### INTERNAL REVENUE CODE:

##### “SEC. 117. CAPITAL GAINS AND LOSSES:

(a) Definitions—As used in this chapter—

(1) Capital assets.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the usual course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(L), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed rate maturity date not exceeding one year from the date of issue or real property used in the trade or business of the taxpayer.

\*       \*       \*       \*       \*       \*       \*       \*

(b) Percentage Taken Into Account.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.”

##### SEC. 1141. COURTS OF REVIEW:

(a) The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States

Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code. As amended May 24, 1949, c. 139, sec. 128, 63 Stat. 107.

(b) VENUE:

(1) In general. Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia. \* \* \*

(c) POWERS:

(1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require. \* \* \*

CALIFORNIA CIVIL CODE:

SEC. 2400. PARTNERSHIP DEFINED:

(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.  
 (2) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Act, unless such association would have been a partnership in this State prior to the adoption of this Act; but this Act shall apply to special and mining partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

SEC. 2419. NATURE OF A PARTNER'S RIGHT IN SPECIFIC PARTNERSHIP PROPERTY.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin and is not community property.

SEC. 2421. ASSIGNMENT OF PARTNER'S INTEREST.

(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance

of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

## SEC. 2425. CAUSES OF DISSOLUTION.

Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 2426.





No. 12928

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**In the United States Court of Appeals  
for the Ninth Circuit**

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ESTATE OF HERBERT B. HATCH, DECEASED, JUANITA O.  
HATCH, EXECUTRIX AND AMERICAN TRUST COMPANY,  
EXECUTOR; JUANITA O. HATCH AND HERBERT B.  
HATCH, JR., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES

---

**BRIEF FOR THE RESPONDENT**

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PAUL P. O'BRIEN



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# **In the United States Court of Appeals for the Ninth Circuit**

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*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES*

---

## **BRIEF FOR THE RESPONDENT**

---

### **OPINION BELOW**

The findings of fact and opinion of the Tax Court (R. 67-74) are reported at 14 T. C. 251.

### **JURISDICTION**

The Commissioner determined the following deficiencies in income tax: \$3,702.31 against the estate of Herbert B. Hatch, deceased, for the period January 1 to April 9, 1944; \$2,199.38 against Juanita O. Hatch for the calendar year 1944; and \$187.22 against Herbert B. Hatch, Jr., for the calendar year 1944. (R. 41.) Notices of the deficiencies were mailed to the taxpayers on February 20, 1948. (R. 14-19,

24-29, 34-38.) On May 17, 1948, within the permitted 90-day period, each taxpayer filed a petition for review with the Tax Court for a deficiency redetermination under the provisions of Section 272 of the Internal Revenue Code. (R. 3, 10-19; 5, 21-29; 7, 31-38.) The Commissioner filed an answer to each petition (R. 19-20, 29-30, 39-40) and a hearing was held in all three cases on May 10, 1949, when the cases were also consolidated on joint motion (R. 4, 6, 8). The decision of the Tax Court in each case was entered on December 28, 1950. (R. 75-77.) A petition for review by this Court covering all three cases was filed on March 23, 1951 (R. 5, 7, 9, 78-87), at which time, by stipulation of the parties, the cases were also consolidated for hearing and decision in this Court (R. 89-90). The Court accordingly has jurisdiction of the cases under Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

#### QUESTION PRESENTED

Whether the sale involved was a sale of partnership assets, as the Tax Court held, or was a sale by taxpayers of their partnership interests, as taxpayers contend.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent Statute and Treasury Regulations are set forth in the Appendix, *infra*.

#### STATEMENT

The facts as reflected solely by a stipulation of facts, including exhibits (R. 40-66), were summarized

by the Tax Court (R. 68-72) and may be restated as follows:

On December 1, 1942, Herbert B. Hatch, his wife Juanita O. Hatch, and their son Herbert B. Hatch, Jr., of Stockton, California, formed a partnership under the name of Hatch Chevrolet Company to engage for an indefinite term "in the business of selling, distributing, repairing, and servicing motor vehicles and motor vehicle parts both at wholesale and retail."

The business was operated under a franchise from the Chevrolet Motor Division of General Motors Corporation. The record does not show whether that franchise was either valuable or transferable. (R. 68-69.)

On February 16, 1944, the Hatches, "as co-partners transacting business under the firm, name and style of Hatch Chevrolet Company", parties of the first part, executed an "Agreement of Sale" (Ex. 2-B, R. 51-55) with King M. Chase, party of the second part, providing in part (R. 69-70):

\* \* \* that first parties will sell to second party all of the business and assets of Hatch Chevrolet Company, a co-partnership, hereinafter listed, and the transaction shall be escrowed until a complete inventory and appraisement has been completed. However, \* \* \* said party of the second part shall take over possession of the physical assets of the business \* \* \* on \* \* \* February 21, 1944, and thence forward shall operate said business to all intents and purposes as though

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<sup>2</sup> The partnership agreement (Ex. 1-A) is printed in the record at pages 45-51.

this transaction has been completed and title thereto passed to the party of the second part.

Second party shall, upon taking possession, have permission to operate the business under the name of Hatch Chevrolet Company for a limited period of time to enable him to make the necessary arrangements for the future title or trade name of said business.

The tentative sales price of said business and assets is the sum of \* \* \* (\$175,229.51). This figure or amount may be appreciated or depreciated according to the results of the inventory to be taken.

The "statement" which is a part of the "Agreement of Sale" reflects only the items to be transferred to Chase pursuant to the agreement and is not a financial statement of the partnership. It does not include cash in bank retained by the partnership in the amount of \$35,249.90, two automobiles having a book value of \$1,542.66, and certain liabilities not assumed by the purchaser in the amount of \$15,588.55. (R. 42.)

On March 3, 1944, the partners delivered a "Bill of Sale" (Ex. 3-C, R. 56-59) to Chase providing that they (R. 56)—

as co-partners transacting business under the firm name and style of Hatch Chevrolet Company, the Parties of the First Part, in consideration of the sum of \* \* \* (\$161,807.77) \* \* \* to them in hand paid by King M. Chase, the Party of the Second Part, the receipt whereof is hereby acknowledged, do by these presents sell unto the Party of the Second Part, his executors, administrators and as-



signs, the following described personal property [listed in a schedule] \* \* \*

The property transferred to Chase included all of the assets of the partnership except the General Motors franchise, two automobiles, cash in a substantial amount, and the partnership name. Chase assumed a part, but not all, of the liabilities of the partnership. (R. 70.)

Chase paid \$5,000 of the purchase price at the time of the agreement of sale on February 16. He paid the remainder of the purchase price, \$156,807.77, by check (Ex. 4-D, R. 60) dated March 3, 1944, payable to the order of the Hatches, "Co-Partners" (R. 70).

The assets of the partnership which were sold to Chase were not distributed in kind to the Hatches prior to the sale thereof. Chase's check dated March 3 was credited to the bank account of the Hatches, "Co-Partners," on March 6, 1944. Partial distributions were made to the Hatches by checks drawn on that account beginning in June 1944. (R. 42-43, 70-71.)

The stipulation of facts states that "The interests of the partners or the assets of the partnership (as the Court may determine) which were sold to Chase had a total cost basis of \$125,138.70 and the gain on the sale was \$36,669.07." (R. 42, 72.)

Herbert B. Hatch died a resident of Stockton, California, on April 9, 1944. Juanita O. Hatch and American Trust Company are the executrix and executor, respectively, under his last will and testament. (R. 71.)

In its amended return for the fiscal year ended June 30, 1944, filed on September 19, 1944, the partnership reported the \$36,669.07 gain on the sale to Chase as a long-term capital gain, \$18,334.54 of which was taken into account and divided as follows (R. 71):

Herbert B. Hatch.....	\$9,778.42
Juanita O. Hatch.....	7,089.35
Herbert B. Hatch, Jr.....	1,466.77

The Hatches separately reported those amounts on their respective individual returns for the taxable periods involved as "Gain or loss to be taken into account." (R. 71.)

The Commissioner allowed the partnership a long-term capital gain from the sale to Chase in the amount of \$22,486.36 (recognized to the extent of \$11,243.18); determined that the remaining gain from the sale, in the amount of \$14,182.71, was ordinary income to the partnership from the sale of property other than capital assets; and made corresponding proportionate adjustments in the individual income of Herbert B. Hatch, Juanita O. Hatch, and Herbert B. Hatch, Jr., for the taxable periods involved, on the ground that "the transaction constituted a sale by the partnership of assets held pursuant to its business; that the \* \* \* [accounts receivable and inventories] transferred in the sale were not capital assets under section 117, Internal Revenue Code, and gain realized thereon was not long-term capital gain". (R. 71-72.)

The Tax Court sustained the Commissioner's deficiency determinations. (R. 72-74.)

## SUMMARY OF ARGUMENT

Under Sections 181, 182 and 183 of the Internal Revenue Code partners are required to pay tax in their individual capacities on their distributive shares of the ordinary income and capital gains of the partnership, whether distributed to them or not. Accordingly, the partners are taxable on the gain from the sale of partnership assets just as though they were the individual owners of the partnership assets; in other words, according to the nature of the gain on each individual asset, as long-term capital gain recognizable to the extent of 50 percent or as ordinary income. In the present case there was concededly a sale of partnership assets, but taxpayers are contending that the sale was in substance and effect a sale of their partnership interests. They make this contention because the sale of a partnership interest has been held to constitute the sale of a single capital asset and acceptance of the contention would make taxpayers' gain taxable as long-term capital gain, only 50 percent of which is recognized, instead of partly as capital gain and partly as ordinary income.

The sale of partnership assets was not transformed into a sale of taxpayers' partnership interests simply because the sale covered most of the assets of the partnership business and therefore could loosely be called a sale of the business. A partnership interest consists of the right to share in the surplus after payment of partnership debts and a sale of the partnership business does not terminate that right. In the present case, for example, partial distributions of the

proceeds of the sale were made not less than three months after the sale and from the partnership bank account. Taxpayers, as the partners, could have started another business. That they did not choose to do so, and apparently ultimately terminated the partnership, is no basis for a conclusion that the sale to Chase was of their partnership interests. The sale of a partnership business is merely a sale of partnership assets in liquidation of assets of the partnership. Under Section 182 the sale has the same effect as to the partners as the sale of a sole proprietorship business to the proprietor thereof. Such a sale has been held not to be the sale of a single asset consisting of the business but, instead, is to be comminuted into its fragments and matched against the definitions contained in Section 117 covering the sale of capital assets.

None of the decisions relied upon by taxpayers gives any real support to their position. Most of the cases involved what was concededly the sale of a partnership interest from one partner to another, not the sale of a partnership business. Only two cases involved the sale or exchange of a partnership business and they were both cases in which the partners incorporated their business. In one of the cases, *Commissioner v. Whitney*, 169 F. 2d 562 (C. A. 2d), certiorari denied, 335 U. S. 892, the transaction was not regarded as a sale or exchange of a single capital asset. In the other case, *Thornley v. Commissioner*, 147 F. 2d 416 (C. A. 3d), the question was as to what one of the partners had exchanged for the stock he re-

ceived in the corporation. It was held that he had exchanged his partnership interest for the stock, but in view of the more recent decision of the same circuit in *Randolph Products Co. v. Manning*, 176 F. 2d 190, it is clear that the *Thornley* decision, if not now incorrect, should be limited in its application to the precise question there presented for decision.

Taxpayers are in no better position even if it be assumed that the *Thornley* decision is to be accepted as authority for a conclusion that the sale of a partnership business may constitute the sale of the partners' partnership interests. What was regarded as an exchange of a partnership interest for stock in the *Thornley* case was an exchange of the taxpayers' interest in the entire business as a going concern, including good will. A partnership interest is no less than an interest in the business as already established as a going concern and no interest of that type was transferred in the instant case. The sale here was only of personal property, thus excluding the garage in which the business was conducted and which apparently was rented, and, more importantly, excluded essential elements of the business as a going concern—the name of the business, good will and the General Motors franchise under which the business was operated. All that happened here was that the partnership sold assets sufficient to enable the purchaser to set up a similar business. Accordingly, even if the sale of a partnership business may in some cases constitute a sale of the partners' partnership interests, this is not such a case.

## ARGUMENT

**The sale was of partnership assets, not of taxpayers' partnership interests**

The Tax Court held that the sale to Chase was a sale by the partnership of assets of the partnership. (R. 72-74.) Taxpayers, the three partners (one of whom is deceased), contend that the sale was a sale by them of their interests in the partnership. (Br. 8-18.) The reason for the contention is that a sale of a partnership interest is a sale of a capital asset and, if this was such a sale, the gain on the sale was all long-term capital gain and only 50 per cent of it is taxable to taxpayers under Section 117 of the Internal Revenue Code (Appendix, *infra*). On the other hand, if the sale was of assets of the partnership, as the Tax Court held, the gain on the sale is taxable to taxpayers according to the nature of the gain to the partnership on each asset sold, with the result that only \$22,486.36 (recognized to the extent of \$11,243.18) was long-term capital gain and \$14,182.71 was ordinary income.

A partner's liability for tax on the gain from a sale of partnership assets according to the nature of the gain on each asset results from express statutory provisions dealing with partnership income. Section 181 of the Code (Appendix, *infra*) provides that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Section 183 (Appendix, *infra*) provides that the net income of a partnership shall be computed in the same manner and on the same basis as in the case of an individual, with exceptions which include the segre-

gation of capital gains and losses. The subject of capital gains is covered by Section 117, which, among other things, defines “capital assets” and provides for recognition of 100 per cent of the gain on a sale or exchange of a capital asset held for not more than six months and for recognition of only 50 per cent of the “long-term capital gain”, consisting of gain from the sale or exchange of a capital asset held for more than six months. Section 182 (Appendix, *infra*), entitled “Tax of Partners”, provides:

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

Accordingly, the partnership is treated only as an accounting entity and the net income and capital gains “of the partnership” are taxed to the individual partners as though they were the individual owners of the partnership assets. See *Commissioner v.*

*Whitney*, 169 F. 2d 562 (C. A. 2d), certiorari denied, 335 U. S. 892. The nature of the gain on a sale of assets of the partnership is determined according to the nature of the individual assets sold, just as in the case of a sale by an individual, and the resulting capital gain and ordinary income of the partnership are taxable to the partners as capital gain and ordinary income respectively.

It should perhaps be emphasized at this point that, when the sale is of assets of the partnership, it is immaterial whether the sale is regarded as made by the partnership or by the partners as individuals. If the partners are regarded as the owners of the partnership assets, they of course as individuals would be taxable on their gain on each asset sold according to whether the gain was capital gain or ordinary income. What Section 182 does is to make the partners taxable in the same manner, as individuals, on capital gain and ordinary income "of the partnership".

Taxpayers concede (Br. 9), as they must, that the instant sale was of assets of the partnership. The bill of sale (R. 56-59) states that the sale is of "the following described personal property" (R. 56) and describes that property as follows (R. 56-57):

All that property set forth and described in the Inventories listing said personal property—

(1) Parts Department Inventory consisting of 165 pages.

(2) Accessory Department and Miscellaneous Merchandise consisting of 18 pages.

(3) Gas, Oil and Grease Inventory consisting of one page.



(4) Duco Material Inventory consisting of 5 pages.

(5) Work in Process & Sublet Repairs consisting of 5 pages.

(6) Tire Department Inventory consisting of 6 pages.

(7) Machinery and Shop Equipment consisting of 19 pages.

(8) Parts & Accessory Equipment consisting of one page.

(9) Furniture & Fixtures consisting of 7 pages.

(10) Service Cars (7) consisting of one page.

(11) Other Fixed Assets, consisting of one page.

(12) New Cars (4) consisting of one page.

(13) New Car Freight and Handling plus Increment consisting of one page.

(14) Used Cars (13) consisting of one page.

The Tax Court found (R. 70) that the sale covered—all of the assets of the partnership except the General Motors franchise, two automobiles, cash in a substantial amount, and the partnership name.

It may also be noted that the sale did not cover the good will of the business nor any real property and therefore not the garage in which the business was conducted.

It should follow without any argument that, as to the sale, the tax consequences to taxpayers are the tax consequences to the partnership. Section 182 requires taxpayers, the partners, to include the ordinary net income and capital gains of the partnership in their gross income, just as they would be required

to do if they were the owners of the assets sold, and the statute makes no distinction between a sale of a small portion, most, or all of the assets of the partnership.

Taxpayers contend, however, that in "substance and effect" the sale was of their partnership interests. (Br. 8.) The first, and most obvious, answer to that contention is that the sale was in actuality and substance a sale of partnership assets the effect of which is controlled by Section 182. The second answer is that, even if it were not for the express statutory provisions, the sale could not properly be construed as having the substance and effect of a sale of taxpayers' partnership interests.

Taxpayers' position seems to be that the sale was of their partnership interests because, as a result of the sale of most of the assets of the partnership, they terminated their interest in the partnership "business" and in the partnership (see Br. 9, 18-21, 24), although they also argue that the sale was of the business "as a going concern" (Br. 12). Neither the termination of taxpayers' interest in the business nor the termination of their interest in the partnership, the latter of which occurred not less than three months after the sale, has any bearing on the question of what was sold to Chase. Had all of the partnership assets been sold piecemeal, instead of to one person, taxpayers could not possibly deny the applicability of Section 182 even though the sales resulted in termination of their interests in the business and in a termination of the partnership. The mere fact that most of the assets were sold to one

person, and that the sale may therefore perhaps be termed a sale of the "business", does not establish that the sale was of taxpayers' partnership interests. The sale of a partnership business does not *per se* terminate a partnership nor the partners' interests in the partnership. It did not do so in this case. While taxpayers argue that it did (Br. 18-21), the facts found by the Tax Court show differently. The Tax Court found that the proceeds of the sale were deposited in the partnership bank account and that partial distributions therefrom were made beginning in June, 1944, which was three months after the sale. (R. 71.) If the partnership was later terminated, it was by voluntary act of the partners, who could have continued the partnership by engaging in some other business. The result of the sale of the "business" was simply to liquidate partnership assets. After the sale, ~~taxpayers' sale of the business was a sale of partnership interests~~ <sup>taxpayers' sale of the business was a sale of partnership interests</sup> Accordingly, the sale of the "business" could consist of their interest in the surplus and profits of the partnership, including the proceeds from the sale. Accordingly, the sale of the "business" could not have constituted the sale of taxpayers' partnership interests.

Section 182 requires that the sale of a partnership business be treated in the same manner as the sale of a sole proprietorship business which, as the Second Circuit stated in *Williams v. McGowan*, 152 F. 2d 570, is not to be treated as the sale of a single piece of property but is "to be comminuted into its fragments" (p. 572) and matched against the definition in Section 117 (a) (1) to determine what part of

the gain on the sale is capital gain and what part ordinary income. A sale of partnership assets, even of the entire business as a going concern, is still a sale of partnership assets. The sale is necessarily made by either the partnership or the partners as owners of the partnership assets. If the sale is regarded as made by the partners as the owners of the assets (which taxpayers will deny), the partners' position as individuals is no different from the position of a sole proprietor. If the sale is not regarded as made by the partners as owners of the partnership assets, the sale is necessarily made by the partnership and Section 182 requires partners to pay tax on the capital gain and ordinary income "of the partnership" and thus to pay tax on the gain on the sale of any and all assets of the partnership according to the nature of the gain on the individual assets.

With the exception of *Thornley v. Commissioner*, 147 F. 2d 416 (C. A. 3d), which we shall discuss later, and *Commissioner v. Whitney, supra*, which really supports our position rather than taxpayers' and will also be discussed later, the decisions upon which taxpayers rely for their contention that the instant sale was of their partnership interests do not relate to the tax consequences of a sale of partnership assets or of a partnership business. The cases all involved what was concededly the sale of a partnership interest, by one partner to another person who either already was or became a partner, and the question was as to the effect of the sale of the partnership interest. See *Commissioner v. Lehman*, 165 F. 2d

383 (C. A. 2d), certiorari denied, 334 U. S. 819; *Commissioner v. Smith*, 173 F. 2d 470 (C. A. 5th), certiorari denied, 338 U. S. 818; *Commissioner v. Shapiro*, 125 F. 2d 532 (C. A. 6th); *Commissioner v. Estate of Gartling*, 170 F. 2d 73 (C. A. 9th); *Ford v. Commissioner*, 6 T. C. 499; and *Humphrey v. Commissioner*, 32 B. T. A. 280. There are other cases to the same effect, but of the Court of Appeals decisions only the *Lehman*, *Smith* and *Shapiro* cases, *supra*, discuss the subject.<sup>2</sup> The decisions all merely constitute a rejection of the Commissioner's contention that the sale of a partnership interest is nothing more than a sale of the selling partner's undivided interest in the individual assets of the partnership, the Commissioner having urged acceptance of the theory, since accepted for other tax purposes (see *Commissioner v. Whitney*, *supra*; and *Randolph Products Co. v. Manning*, 176 F. 2d 190 (C. A. 3d)), that a partnership is an aggregation of individuals rather than a legal entity. In the *Lehman*, *Smith* and *Shapiro*

<sup>2</sup> This Court's decision in *Commissioner v. Estate of Gartling*, *supra*, merely affirmed *per curiam* on the authority of the Court's prior decision in *Stilgenbaur v. United States*, 115 F. 2d 283, which did not however expressly hold that a sale of a partnership interest is a sale of a capital asset. *United States v. Shapiro*, 178 F. 2d 459, which is not cited by taxpayer, is a case similar to the others in which the Eighth Circuit, without discussion of the question involved, merely followed what was stated to be the overwhelming weight of authority. *Long v. Commissioner*, 173 F. 2d 471 (C. A. 5th), certiorari denied, 338 U. S. 818, is another similar case not cited by taxpayer. On the pertinent point, that case was decided by reference to the same court's decision in *Commissioner v. Smith*, *supra*.

cases *supra*,<sup>3</sup> the cases which discussed the subject, the rejection of the Commissioner's contention was based on statements to the effect that a partner has no individual property right in specific assets of the partnership and that, instead, a partner's interest in the partnership or in the partnership assets is "his share of the profits and surplus" (*Commissioner v. Lehman, supra*, p. 385). "his share in the surplus, after the partnership debts are paid and after the partnership accounts are settled" (*Commissioner v. Shapiro, supra*, p. 535) and "in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners" (*Commissioner v. Smith, supra*, p. 470). In the *Smith* case, *supra*, it was added that (p. 470)—

The taxpayer [by his sale of a partnership interest] here sold an intangible asset or chose in action, not his interest in the specific assets of the firm \* \* \*.

Taxpayers are not aided by the holding in these cases that the sale of a partnership interest is more than the sale of an undivided interest in the partnership assets. That holding implies that a sale of partnership assets is not a sale of a partnership interest, whereas taxpayers are contending that it is in this case.

If a partner has no individual property right in the specific assets of the partnership (as distinguished from the undivided interest he has with the other

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<sup>3</sup> All references to the *Shapiro* case, *supra*, are to *Commissioner v. Shapiro*, 125 F. 2d 532 (C. A. 6th), as distinguished from the decision of the Eighth Circuit in *United States v. Shapiro, supra*, mentioned in fn. 2.

partners) and his interest is only in the surplus after payment of partnership debts, as the above-discussed cases hold, it must necessarily follow that a partner's interest is in the partnership as an entity. See *Commissioner v. Whitney, supra*. If the partnership is in business, the partner's interest includes the right to share in the profits and surplus of the business *with all of its assets as a going concern, including its name and its good will*. That is what is ordinarily transferred upon the sale of a partnership interest by one of the partners to a purchaser who either already is or who becomes a partner. Thus, in the *Shapiro* case, *supra*, where there were two partners each owning a 50 per cent interest in the partnership and one partner sold out to the other, the Sixth Circuit stated as follows (p. 535):

The only question presented on the record is whether the sale of the assets of a partnership *as a going concern* is the sale of a capital asset \* \* \*.

Petitioner presses the point that the issue depends primarily upon the extent to which a partnership is to be regarded as an entity, separate and apart from its members. In our opinion, a decision of this more or less troublesome question would throw no light on the present controversy. The case must be viewed as though *the entire assets of the partnership with its value as a going concern added were sold*. The fact that a one-half interest in the partnership assets *and its good will* only were sold has nothing to do with the issue, and the further fact that the sale was from one partner to another has no more to do with the question

than if the sale had been made to a stranger. \* \* \*

\* \* \* \* \*

The decision must turn on the meaning of the phrase, "capital assets" as that phrase is ordinarily understood. The term is not used in any technical sense, but in its natural and ordinary signification, and construing the phrase as used, *it means all capital invested plus all surplus accounts or undivided profits left in the business for the purpose of accumulating and being used in the business and in addition such good will as had been established and accumulated over the years of its existence.* The present partnership was dissolved by the sale under the fundamental principle that every change in the personnel of a firm works dissolution, and that an existing partnership is terminated and a new partnership formed whenever a partner retires or a new one is admitted, but where, as here, there is a sale of a part interest in the partnership *as a going concern*, no change is wrought in the character of the property sold. [Italics supplied.]

While this case reflects what the sale of a partnership interest covers, it should be noted that the case does not hold that the sale of a partnership business by the partnership (or by all of the partners) terminates the partnership interests of the partners and constitutes a sale of those interests. The sale in the *Shapiro* case was of a partnership interest by one partner to the other, and the sale naturally had the effect of terminating the selling partner's partnership interest. That a sale of the partnership busi-



ness by the partnership (or by all of the partners) does not have that effect is implicit in the statement of the court that a partner's interest is "his share in the surplus after the partnership debts are paid and after the partnership accounts are settled". (P. 535.)

Of all the cases relied upon by taxpayers, only *Thoruley v. Commissioner, supra*, and *Commissioner v. Whitney, supra*, involved the sale of a partnership business by the partnership (or by all of the partners). Taxpayers ignore the result reached in the *Whitney* case and place their principal reliance upon the *Thoruley* decision. In the latter case an advertising business conducted as a partnership under the name of "N. W. Ayer & Son" was incorporated under the name of "N. W. Ayer & Son, Incorporated" (p. 417), with the partners each receiving their proportionate share of the stock issued by the corporation. Upon a sale of some of such stock by the taxpayer, the amount of his recognizable gain depended upon his holding period on the stock and he was entitled to tack onto his holding period on the stock the period for which he had held the property exchanged for the stock. The taxpayer contended that the property he exchanged for the stock was his partnership interest and the Tax Court held that the property exchanged was his interest in the specific assets of the partnership. The Third Circuit viewed the case as presenting a question on the evidence and decided the case accordingly, holding that (pp. 421, 422):

From the above it is clear that the subject matter of the *direct* exchange between the partnership and the corporation was the partnership interest in the entire business and its physical assets, real and personal and good will *as a going concern*.

\*                      \*                      \*                      \*

Simply stated, what happened here was an incorporation by the partners of their partnership business.      \*      \*      \*

\*                      \*                      \*                      \*

Here clearly the petitioner and his co-partners acting in concert gave up his partnership interest in exchange for the stock of the corporation.

The *Thornley* decision gives a semblance of support to taxpayers' general position that the sale of a partnership business may (not does) constitute the sale of the partners' partnership interests, but the case not only is distinguishable from the present case in an important respect, as we shall show presently, but it is a decision which should be limited in its application. The question there presented was simply what the taxpayer *as an individual* had exchanged for the stock. If he had no individual interest in the assets of the partnership (as the other cases discussed above hold), on the facts of the case he necessarily could only have exchanged his interest in the firm, which is what the *Thornley* decision assumed to be a partnership interest. The Third Circuit, which decided the *Thornley* case, has since held that the partners are the individual owners of the partnership assets and that a partnership is not a legal entity.

In *Randolph Products Co. v. Manning, supra*, the Third Circuit had before it a case in which the corporate taxpayer's stock was all owned by a husband and wife who were also members of a partnership from which the corporation received rent. The question was whether the rent received by the corporation from the partnership was personal holding company income within the meaning of Section 502 (f) of the Code as having been received from "an individual entitled to the use of the property." The Third Circuit stated (pp. 192-193):

The crux of the taxpayer's position is that (1) a partnership is a separate and distinct business unit or entity; (2) where a partnership is a tenant it is the partnership which is "entitled to the use of the property;" \* \* \*

We cannot subscribe to the taxpayer's view. Under both the Internal Revenue Code and the applicable local law a partnership is not an entity separate and distinct from the individual partners.

While it is true that the Code for certain informational and accounting purposes requires the filing of partnership returns the partnership is merely a tax computing unit and is not a taxpayer or a taxable entity. \* \* \*

The concept of a partnership as an entity, owning property apart from its partners was rejected by the Second Circuit in *Commissioner v. Whitney*, 1948, 169 F. 2d 562, certiorari denied 335 U. S. 892, \* \* \*. In that case losses sustained on the sale of partnership assets to a corporation controlled by the partners and organized by them to take over the part-

nership business were held non-deductible under Section 24 (b) (1) (B) of the Internal Revenue Code which disallows losses between "an individual" who owns more than 50 per cent of a corporation's stock, and such corporation, except in the case of distributions and liquidations.

The Court in the *Whitney* case held that neither the revenue laws nor the Uniform Partnership Act (effective in New York) contained the slightest basis for recognition of the partnership as a taxable entity. \* \* \*

\* \* \* \* \*

After an exhaustive review of the subject the Court stated its conclusion as follows, 169 F. 2d at page 568: "There is no doubt that generally speaking under the tax law we must approach the partnership as an association of individuals who are co-owners of its specific property and who are taxed, while the partnership is not."

We deem the *Whitney* case analogous to the situation here presented and we subscribe to the holding therein. Any further discussion would be repetitious in view of the comprehensive analysis made by the Second Circuit. Accordingly we are of the opinion that the income of a corporation derived exclusively from the rental of its property to a partnership consisting of husband and wife who own all of the corporation's capital stock is "personal holding company income" within the meaning of Section 502 (f).

Accordingly, the Third Circuit has now adopted the view which it rejected in the *Thornley* case—that a

partnership is not a legal entity but, instead, the partners are the individual owners of the partnership property. The *Thornley* decision, if not now incorrect under the same court's decision in *Randolph Products Co. v. Manning*, *supra*, certainly at least must be limited in its application to the question involved in the *Thornley* case, which was simply what the taxpayer *as an individual* had exchanged for the stock.

The *Whitney* decision of the Second Circuit, which taxpayers cite but do not discuss (Br. 14) and which was relied upon by the Third Circuit in *Randolph Products Co. v. Manning*, *supra*, is opposed to taxpayers' contention that the sale of a partnership business constitutes the sale of a single capital asset. In the *Whitney* case, as in the *Thornley* case, the partners incorporated their business. In the assets transferred by the firm to the corporation certain securities showed a gain in value over their cost, while others showed a loss, and the partnership had both long-term and short-term capital losses. The inquiry was whether the capital losses of the partnership were deductible by the partners. Because Section 24 (b) (1) (B) of the Code (26 U. S. C. 1946 ed., Sec. 24) prohibits any deduction for losses from sales or exchanges of property between an individual and a corporation whose stock is more than 50 per cent owned by or for him, the taxpayer-partners contended that the partnership was an entity, owning and transferring property apart from its partners, and that, therefore, Section 24 (b) (1) (B) did not prohibit the deductions. The Second Circuit held otherwise

in an opinion which discussed the subject at length. As to its decision in the *Lehman* case, on which taxpayer relies and which we have already mentioned, the court stated (pp. 567-568):

That case applied the unitary concept of a partnership to the extent of reaching a result which, we agree, was in line with ordinary business conceptions and the there practical statutory intent. \* \* \*

\* \* \* However justified we have been in following business practices to treat a share of the firm itself apart from the individual interests, *Commissioner of Internal Revenue v. Lehman, supra*, we cannot find justification in the precedents and the statute for carrying the rule so far as to apply it by analogy to the ownership of specific property or to disregard the direct specifications of individual ownership of partnership property. \* \* \*

Thus the *Whitney* case was a case of the sale of a partnership business in which the sale was recognized as being of the assets of the partnership (not of the partners' partnership interests) and the partners were assumed to be taxable on the partnership assets according to the nature of the gain or loss on each asset but were not entitled to deductions for capital losses on the sale because of the specific prohibition of Section 24 (b) (1) (B).

Up to this point we have been discussing taxpayers' general position that the sale of a partnership business constitutes a sale of the partners' partnership interests. Since the sale of a partnership business is nothing more than a sale of partnership assets and

does not terminate a partner's status as a partner, the sale is necessarily of partnership assets, not of the partners' partnership interests, and the tax consequences are that, by virtue of the express provisions of Section 182 of the Code, the partners are taxable on the gain from the sale as though they were the individual owners of the partnership assets. Regardless of whether they actually are or not, that conclusion, as we have attempted to show, is in no way inconsistent with the decisions holding that the sale of a partnership interest by one partner to another constitutes the sale of a single capital asset.

If it nevertheless be assumed, on the basis of the *Thornley* decision, that the sale of a partnership business *may* constitute a sale of the partners' partnership interests, it then becomes important to determine *when* the sale of a partnership business constitutes a sale of the partnership interests. As already stated, if the partners are not regarded as the individual owners of the partnership assets, their partnership interests necessarily consist of an interest in the partnership firm as an entity (in line with the earlier cases, as distinguished from the *Whitney* case and *Randolph Products Co. v. Manning, supra*) and, hence, of a right to share in the profits and surplus of a firm *as a going concern with assets, a name and good will*. That much is evident from the *Shapiro* decision, *supra*. The *Thornley* decision is consistent with the *Shapiro* case in that connection, for in the *Thornley* case the transfer from the partnership to the corporation was of the following (p. 418):

the entire plant, property, machinery, equipment, fixtures, business and *good will* of the N. W. Ayer & Son partnership including all book accounts and accounts receivable outstanding, contracts, copyrights, trade marks, claims, causes of action, and *all rights and all assets and property of any kind or nature whatsoever belonging or appertaining to the said partnership and to the business thereof*, subject, however, to all the adjustments to be made as more fully set forth in said Agreement of April 23rd, 1929, and further subject to all outstanding liabilities and indebtedness of said partnership, which the said corporation, N. W. Ayer & Son, Incorporated, hereby assumes, \* \* \* [Italics supplied.]

Moreover, in the *Thornley* case it appears that the court regarded the following conclusion as factually decisive (p. 421):

From the above it is clear that the subject matter of the *direct* exchange between the partnership and the corporation was the partnership interest in the entire business and its physical assets, real and personal and good will *as a going concern*.

Contrary to taxpayers' contention (Br. 12-13), the instant sale was not of their interests in the partnership firm as a going concern. The business of the partnership, conducted under the name of Hatch Chevrolet Company, was the selling, distributing, repairing and service of motor vehicles both at wholesale and retail and the business was conducted under a franchise from the Chevrolet Motor Division of General Motors Corporation. (R. 69.) On the sale



to Chase, the partnership (or taxpayers as partners) did not authorize Chase to use the partnership firm name, except for a limited time to enable him to make the necessary arrangements for the future title or trade name of the business. (R. 69-70.) The sale covered only tangible personal property and did not include good will. Further, the sale did not cover the Chevrolet franchise, which taxpayers state (Br. 9) was nontransferable. Thus, all that happened was **that Chase purchased** most of the stock and equipment of the partnership and thereafter conducted a garage business, apparently on the same premises as the partnership before him. The going concern business conducted by the partnership firm was a business conducted under a Chevrolet franchise and Chase did not receive the franchise on the sale. For all that appears from the record, Chase may not even have sold Chevrolets. Nor did Chase receive any benefit from the fact that the partnership had previously conducted a garage business on the same premises, assuming that he did conduct it on the same premises and even also assuming that Chase secured a Chevrolet franchise for himself. The change in ownership and necessary change of name of the business conducted on the premises made it impossible for him to derive any good will benefit from the previously conducted partnership business. That was recognized by the fact that the sale did not cover good will. The necessary conclusion is simply that the partnership (or taxpayers as partners) sold and Chase bought personal property, such as equipment, parts, cars, etc., with which to conduct a garage

business. Certainly, the partnership did not sell and Chase did not receive any interest in or from the partnership firm as an established business or going concern. Contrary to taxpayers' argument (Br. 24), it is immaterial that the partnership discontinued its garage business and that Chase began operation of a garage business with substantially the same equipment and stock. The sale could not be of taxpayers' interest in the partnership when it was not of taxpayers' interest in the partnership firm *as an established business or going concern*.

#### CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted.

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*Assistant Attorney General.*

ELLIS N. SLACK,

LEE A. JACKSON,

MELVA M. GRANNEY,

*Special Assistants to the Attorney General.*

OCTOBER 1951.

## APPENDIX

### Internal Revenue Code:

#### SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) *Capital assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), \* \* \*

\* \* \* \* \*

(4) [as amended by Sec. 150 (a) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Long-term capital gain*.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income.

\* \* \* \* \*

(b) [as amended by Sec. 150 (c) of the Revenue Act of 1942, *supra*]. *Percentage taken into account*.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

\* \* \* \* \*

(26 U. S. C. 1946 ed., Sec. 117.)

## SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. (26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182 [as amended by Sec. 150 (g) (1) of the Revenue Act of 1942, *supra*]. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b). (26 U. S. C. 1946 ed., Sec. 182.)

## SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) [as amended by Sec. 9 (c) (1) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule*.—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d).

(b) [as amended by Sec. 150 (g) (2) (A) of the Revenue Act of 1942, *supra*]. *Segregation of items*.—

(1) *Capital gains and losses*.—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss.*—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

(c) *Charitable contributions.*—In computing the net income of the partnership the so-called “charitable contribution” deduction allowed by section 23 (c) shall not be allowed; but each partner shall be considered as having made payment, within his taxable year, of his distributive portion of any contribution or gift, payment of which was made by the partnership within its taxable year, of the character which would be allowed to the partnership as a deduction under such section if this subsection had not been enacted.

(d) [as amended by Sec. 9 (c) (2) of the Individual Income Tax Act of 1944, *supra*]. *Standard deduction.*—In computing the net income of the partnership, the standard deduction provided in section 23 (aa) shall not be allowed. (26 U. S. C. 1946 ed., Sec. 183.)

#### SEC. 188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner. (26 U. S. C. 1946 ed., Sec. 188.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.182-1. DISTRIBUTIVE SHARE OF PARTNERS.—(a) Each partner is required to include in his return for his taxable year within which or with which the taxable year of the partnership ends, whether or not distributed:

(1) As part of his gains and losses from sales or exchanges of capital assets held for not more than six months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than six months.

(2) As part of his gains and losses from sales or exchanges of capital assets held for more than six months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months.

(3) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

\* \* \* \* \*

SEC. 29.183-1. COMPUTATION OF PARTNERSHIP INCOME.—The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that:

(1) The partnership is required to segregate its gains and losses from sales or exchanges of capital assets. A partnership is not allowed the benefit of section 117 (e).

(2) The partnership is further required, after excluding all items described in paragraph (1), to compute (a) an ordinary net income which consists of the excess of gross income over the deductions, or (b) an ordinary net loss which consists of the excess of the deductions over the gross income. \* \* \*

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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 12928

---

ESTATE OF HERBERT B. HATCH, *Deceased*, Juanita O. Hatch,  
Executrix and American Trust Company, Executor;  
JUANITA O. HATCH and HERBERT B. HATCH, JR., *Peti-*  
*tioners,*

VS.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

---

On Petition to Review a Decision of the Tax Court  
of the United States.

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## REPLY BRIEF FOR PETITIONERS.

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CLERK





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REPLY BRIEF FOR PETITIONERS.

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## SUMMARY.

A considerable portion of Respondent's brief reargues the already settled question of whether a partnership interest can be sold as a capital asset or whether a sale by partners is a sale of the individual partner's undivided interest in each partnership asset.

Respondent's argument has been uniformly rejected by the Courts (Pet. Br. 13, 14) and repudiated by the Commissioner himself (Pet. Br. 22). Likewise, Respondent's argument seizes upon trifles in an effort to distinguish this

case from the authority relied upon by Petitioner (Pet. Br. 13, 14) and fails to meet Petitioner's argument that the transaction in question was in "substance and effect" as well as in "form and appearance" a sale of the partnership interests.

### **THE TAX COURT'S FINDINGS OF FACT.**

This case was tried in the Tax Court solely upon stipulated facts. The government's brief relies upon and attempts to perpetuate certain erroneous findings of the Tax Court (R. 69-74) and unjustified inferences which find no support in the Stipulation of Facts—the only evidence of record (R. 40-59).

The facts as stated by Respondent are essentially those of the Tax Court (Resp. Br. 2-6). In comparing such conclusions with the Stipulation of Facts, important errors involving unjustified inferences are evident. The Stipulation provides that:

"13. Prior to February 21, 1944, the Hatch Chevrolet Co. operated its business under a franchise from the Chevrolet Division, General Motors Corporation" (R. 45)

Upon the basis of the wording of the Stipulation, the Tax Court found that:

"The business was operated under a franchise from the Chevrolet Motor Division of General Motors Corporation. The record does not show whether that franchise was either valuable or transferable" (R. 69, Resp. Br. 3).

The Tax Court also found that:

"The property transferred to Chase included all of the assets of the partnership except the General Motors franchise, two automobiles, cash in a substantial amount, and the partnership name. Chase assumed a part, but not all, of the liabilities of the partnership" (R. 70, Resp. Br. 5).

In addition to the portion of the Stipulation above cited, this finding was also based upon the "Agreement of Sale" (Exh. 2-B, R. 52) which was attached to the Stipulation and which provided that:

"Second party shall, upon taking possession, have permission to operate the business under the name of Hatch Chevrolet Company for a limited period of time to enable him to make the necessary arrangements for the future title or trade name of said business."

and Paragraph (4) of the Stipulation which reads in part, (R. 42)

"... It (the 'statement') does not include cash in the bank which was retained by the partnership in the amount of \$35,249.90 and two automobiles having a book value of \$1,542.66, and certain liabilities not assumed by the purchaser in the amount of \$15,588.55".

The above quotations must be analyzed in the light of the terms of the "Agreement of Sale" that:

"... first parties will sell to second party all of the *business* and assets of Hatch Chevrolet Company, a co-partnership, and thence forward (second party) shall operate said *business* to all intents and purposes as though this transaction had been completed and title thereto passed to the party of the second part." (R. 51, 52) (Emphasis supplied)

It is difficult to understand how the Tax Court, from this evidence could determine that:

"The stipulated facts show that the partners made no effort to sell and Chase did not buy their individual interests in the partnership or any part of those interests, but on the contrary, the subject of the sale was part of the partnership assets subject to a part of the partnership liabilities." (R. 74)

Furthermore, it is equally difficult to understand how the Tax Court could further determine that:

"The partnership was not terminated by the sale. It retained some of its assets and the amount realized

from the sale. Later it distributed its assets to the individual partners in liquidation.” (R. 74)

These determinations of the Tax Court completely distort the logical conclusions to be drawn from the evidence. Respondent’s argument in his brief increases this distortion, hence, each error merits additional analysis.

### **SALE OF PARTNERSHIP INTERESTS.**

Proof of the sale of partnership interests as distinguished from the sale of assets has been fully discussed (Pet. Br. p. 8-14).

The fact that the “Agreement of Sale” recited an inventory to be taken to determine the price of the sale (R. 52) appears to have confused the Tax Court and the Respondent into seeing nothing involved but a sale of assets.

Such a standard business procedure of using the inventory value of underlying assets to determine the value of each of the partnership interests did not prevent the sale from being that of partnership interests in the Thornley case. *Thornley v. Commissioner*, 147 F. 2d 416 (CA-3, 1945)

However, Respondent (arguing in support of the Tax Court’s findings) attempts to compress this entire case into the one sentence: “the necessary conclusion is simply that the partnership (or taxpayers as partners) sold and Chase purchased personal property, such as equipment, parts, cars, etc., with which to conduct a garage business” (Resp. Br. 29). To buttress this “necessary conclusion” the government states that “the garage in which the business was conducted” was not included (Resp. Br. 13).

The references to a “garage business” are distortions of the record. The only references to the primary nature and scope of the business conducted by the partnership is to be found in the partnership agreement: “The parties hereto agree to associate themselves as co-partners in the business of selling, distributing, repairing, and servicing

motor vehicles and motor vehicle parts both at wholesale and retail" (Exh. 1-A, R. 45, 46) and in the Stipulation that "prior to February 21, 1944, the Hatch Chevrolet Co. operated its business under a franchise from the Chevrolet Motor Division, General Motors Corporation" (R. 45).

Based upon these simple statements of fact, the government urges the existence of a garage, concerning which the record is entirely silent. It argues that this case should be affirmed because that "garage" which Respondent has fabricated, was not included in the bill of sale (Resp. Br. 13).

Repairs of vehicles and the sale of parts were naturally incidental to and arose from the main purpose of the partnership enterprise and so necessarily passed with a sale of the business.

Yet the government further concludes (Resp. Br. 29) that only a "garage business" was sold because the sale did not cover the Chevrolet franchise and good will. (Resp. Br. 29). The reference to the franchise in the record is merely the narration of a past fact and has no evidentiary value in the determination of this case. (Stip. par. 13, R. 45).

The record does not disclose the terms and conditions of the franchise. The Tax Court should be precluded from speculating, as it did, as to the contents of the franchise or its treatment as an asset. By predicated its opinion upon hypothesis rather than fact, the result deprives the government's argument of all force and effect.

It is common knowledge in the automobile industry that a General Motors dealership franchise is a standard form contract, personal in nature and specifically retains "good will", if any, to the manufacturer upon termination of the franchise. These facts have been recognized by the Tax Court in *Floyd D. Akers v. Commissioner of Internal Revenue*, 6 T. C. 693, 694, wherein the Court stated:

"The franchises under which the corporation operated were not assignable and were 'personal contracts' between the General Motors Corporation and petitioner.

“... The franchises were the standard forms used by the General Motors Corporation for the exclusive sale of its products in specified territory and were similar to the forms used by the automotive industry as a whole.”

Continuing, the Court stated (P. 700)

“... These names [of the cars sold] and the good will attached thereto were specifically reserved to the General Motors Corporation in the franchise agreements, in which no provision was made for payments for good will or going concern value in the event of their termination....

“... The good will, if any, continued to be embodied in the franchises and they, under the circumstances, were not property subject to transfer or other disposition by the corporation. *Noyes-Buick Co. v. Nichols*, 14 F. 2d 548.”

The retention by the Hatches of immaterial assets has been fully discussed by petitioner. (Pet. Br. 14-18).

An important fact, overlooked by the Tax Court, is that the purchaser, Chase, in buying the interests of the partners, did, as a result, thereby receive a going business concern, as in the *Thorndley* case, *supra*, which he, Chase, operated from 8:00 o'clock A. M. on Monday, February 21, 1944 (R. 52) and for which he agreed to protect the former partners from liability for the continued use of their name as the name of the business. (R. 54).

Certainly the elimination of immaterial assets and liabilities from the calculation of the value of the partnership interests and the retention of such by the Hatches cannot prevent the sale from being that of partnership interests.

Respondent argues that the case of *Randolph Products Co. v. Manning*, 176 F. 2d 190, limits the application of the *Thorndley* case (Resp. Br. 23-24). The *Randolph* case involved rental income received by corporation from a partnership. One of the partners owned 94% of the stock of the Corporation. The issue presented was whether the cor-



poration was a personal holding company and how its income should be taxed. The case can, therefore, be distinguished on the facts, the issue presented and the sections of the Code involved.

Again, Respondent is merely re-opening and re-arguing the now settled law, confirmed by the overwhelming weight of authority (and the Commissioner's General Counsel himself\*) which treats the sale of a partnership interest as the sale of a capital asset (Pet. Br. 22, 23).

For this same reason, Respondent's lengthy comments concerning the case of *Commissioner v. Whitney*, 169 F. 2nd 562—certiorari denied, 335 U. S. 892, can be disregarded (Resp. Br. 21).

### **TERMINATION OF THE PARTNERSHIP.**

The erroneous conclusion of the Tax Court (R. 74) and argument of the Respondent (Resp. Br. 15) that the partnership composed of the Hatches continued after the sale to Chase involves not only the question of the retention of minor assets and liabilities by the former partners, but also a disregard of the controlling law.

The Tax Court, as well as respondent's brief, has confused the termination of the partnership with the distribution between the former partners of the proceeds of the sale.

The Tax Court stresses the fact that the partners retained "the amount realized from the sale", and made distribution "later" (R. 74). All they really did was to merely collect the money for their interests. It was not, and could not have been, the conduct of "a business for profit" which is the characteristic of a partnership under Section 2400(1) of the California Civil Code (Pet. Br. 19). Chase took over the Hatch Chevrolet Company bank account (Exh. 4-D, R. 60) and the Hatches deposited the check given in payment for their interests in a different bank to

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\* (GCM26379, Pet. Br. 22).

conveniently clear it. They couldn't very well cut it into pieces. Withdrawing the money as they did was the natural and orderly way to do it.

All they did was to proceed under the applicable California law which the Tax Court failed to recognize. The sale to Chase terminated the partnership and nothing remained thereafter except to distribute the proceeds among the former partners.

### CONCLUSION.

It is respectfully submitted that the sale by the Hatches was the sale of their partnership interests and should be treated as the sale of capital assets. Since the decision of the Tax Court is predicated upon erroneous conclusions drawn from the evidence as well as inferences of fact not justified by the record, and is contrary to law, it should be reversed.

FREDERIC D. DASSORI,  
DEE R. BRAMWELL,  
*Counsel for Petitioner.*

No. 12929

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Court of Appeals  
For the Ninth Circuit

NORVELL MILBERN  
BICKFORD,

*Appellant,*

vs.

UNITED STATES OF  
AMERICA,

*Appellee.*

Upon Appeal from the United States District Court  
District of Arizona

BRIEF FOR APPELLEE

FRANK E. FLYNN,  
*United States Attorney*

FILED



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BRIEF FOR APPELLEE

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STATEMENT

This is an Appeal from an order of the United States District Court for the District of Arizona denying Appellant's petition for release from illegal confinement pursuant to provisions of Title 28, U.S.C. Section 2255.

The jurisdictional statement in the Appellant's brief correctly shows the jurisdiction of the District Court and of this Court.

Plaintiff's brief contains a substantially correct statement of the record in the case and contains sufficient information for the determination of the issues raised by Appellant.

We, therefore, do not find it necessary to make any additional statements, but in the course of the argument we will refer to the record when we deem it necessary.

## QUESTIONS PRESENTED

1. Did the Appellant enter a plea of guilty to the second count of the indictment?
2. Was the Appellant denied effective assistance of counsel?
3. Did the United States District Court for the District of Arizona have jurisdiction of the offense alleged in the second count?
4. Was the judgment and sentence imposed by the Court void because of indefiniteness, ambiguity and uncertainty?

## ARGUMENT

In reply to Appellant's argument we will discuss the points raised in the same order in which they appear in Appellant's brief.

### POINT 1.

#### DID THE APPELLANT ENTER A PLEA OF GUILTY TO THE SECOND COUNT OF THE INDICTMENT?

One Donald Webster, Jr., a member of the Bar of Arizona was appointed to represent defendant. (T.R. 4). Subsequent thereto, on April 2, 1947, Appellant, with his counsel, appeared in Court and counsel for Appellant moved for a dismissal of Count 2, which motion was argued and submitted. (T.R. 5). Subsequently, on April 14, 1947, an order was entered denying Appellant's motion to dismiss. (T.R. 6). There is nothing in the record to show that Appellant or his counsel was present at the time of the entry of this order.



In support of this first point Appellant lays considerable stress upon the fact that defendant was absent when a motion to dismiss was denied and when the time was set for his entering his plea. No authorities are cited in support of this contention.

There are plenty of authorities to the effect that it was not necessary for defendant to be present when preliminary motion was heard or ruled on.

*Snyder vs. Commonwealth of Massachusetts*

291 U.S. 97 — 90 A.L.R. 575

*U.S. vs. Lynch* — 132 Fed. 2nd. 111

We quote the following from the opinion in the Snyder case supra:

“No where in the decision of this court is there a dictum, and still less a rule, that the 14th Amendment assures the privilege of presence when the presence would be useless or the benefit be a shadow.”

The fact that Appellant appeared with counsel at the time set and entered his plea of guilty would constitute a waiver of any right he might have had to have been present at the time of the setting. At the time Appellant entered his plea it was apparent from the record that he should have been fully aware of the seriousness of the charge against him and certainly his counsel was also charged with notice. This is also very apparent from the record made at the time of passage of sentence. We quote from the statement made by the Court in the presence of the defendant and his counsel,

“He has been charged with a very serious offense . . .”

While this statement was made to the co-defendant, it was immediately followed by the Court addressing the Appellant. (T.R. 42). At this hearing the Court

also mentioned kidnapping. After passing sentence on Appellant the Court stated,

“Now that may not mean anything. You will probably be out some other time kidnapping somebody else or violating some other law.”

In taking into consideration the foregoing and the entire record, the Appellant must have known that he was entering a plea of guilty to the second count of the indictment charging him with the transportation of a kidnapped person and his plea of guilty admitted the truth of whatever was sufficiently charged in the indictment and waived all defenses other than that the indictment charged no offenses.

*Forthoffer vs. Swope*

103 Fed. 2nd. 707 (9th Cir.)

*Kachnic vs. U.S.* — 53 Fed. 2nd. 312.

79 A.L.R. 1366 (9th Cir.)

*U.S. vs. Otto* — 54 Fed. 2nd. 277

Appellant cites *Nicely vs. Butcher* — 81 W. Va. 247, and quotes part of the opinion. (Appellant's brief, Page 11).

Certainly the plea in this case was made by a person of competent intelligence, freely and voluntarily. Had Appellant entered his plea of guilty on his first appearance in Court, there might be some slight grounds for contending that he did not do so with full understanding of the nature and effect. In the present case, Appellant first entered a plea of not guilty, later and with aid of counsel, this plea was withdrawn and the plea of guilty entered. The record heretofore quoted clearly indicates that the Court and everyone present knew what Appellant was pleading to.

## POINT 2.

WAS THE APPELLANT DENIED  
EFFECTIVE ASSISTANCE OF  
COUNSEL?

The counsel appointed by the Court was a member of the Bar of Arizona and according to the record had practiced law two years in Chicago before coming to Arizona. He was present with the Appellant at every important step in the proceedings. The situation here is entirely different from a case where the defendant stands trial and it clearly appears from the record that counsel was incompetent and did not protect his client's rights. We have nothing in this record showing incompetency on the part of counsel except the unsupported statement of Appellant, nor does it appear in the record that there is anything more that could have been done for the Appellant. Therefore, the authorities cited by counsel are not in point and his contention is without merit.

## POINT 3.

DID THE UNITED STATES DIS-  
TRICT COURT FOR THE DISTRICT  
OF ARIZONA HAVE JURISDIC-  
TION OF THE OFFENSE ALLEGED  
IN THE SECOND COUNT?

In support of this point the Appellant relies almost solely upon his Memorandum of Points and Authorities accompanying his petition for release quoted in Appellant's brief on Page 14.

Appellant's argument in this case is based on the false premise that Appellant was charged with the crime of kidnapping. Section 408a of Title 18 U.S.C., which is the statute upon which the second count of the indictment was based, does not describe the crime of kidnapping. The reading of the first few lines of the

section is sufficient to show that the crime charged is that of transporting a person who had been unlawfully seized or kidnapped. Under this section no Federal offense was committed until there has been a transportation in interstate commerce, and therefore there was no Federal violation until the victims in this case were transported into the State of Arizona from the State of Nevada. The crime, therefore, having been committed in the State of Arizona, was properly prosecuted in this jurisdiction.

Section 3237, Title 18, U.S.C.\*

The above section, which is a 1948 revision of a former section, completely answers this point.

It has been a universal practice in cases of this kind to prosecute either in the jurisdiction of the state where the transportation started or in the jurisdiction into which the victims were transported.

*Gooch vs. U.S.* — 297 U.S. 124

The above case was one of the earliest prosecutions based upon the section of this statute with which we are concerned. The victims, who were officers of the law, were kidnapped in Texas and transferred to Oklahoma. The prosecution was in Oklahoma and the death penalty was imposed. There are many other authorities in support of this position.

*Chatwin vs. U.S.* — 326 U.S. 455-464

*U.S. vs. Baker* — 71 Fed. Supplement 377

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\* Offenses begun in one district and completed in another.

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, c. 645, 62 Stat. 826.

We quote the following from Page 464 in the opinion in the Chatwin case:

“In short, the purpose of the Act was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind.”

We also quote from the syllabus in the Baker case,

“The statute punishing one who transports kidnapped persons was designed to punish one guilty of the transporting of the kidnapped persons in interstate commerce . . .”

#### POINT 4.

WAS THE JUDGMENT AND SENTENCE IMPOSED BY THE COURT VOID BECAUSE OF INDEFINITENESS, AMBIGUITY AND UNCERTAINTY?

Under this point the Appellant again relies upon the Memorandum of Points and Authorities submitted in support of his motion for release, Page 16 —

“The Court stated in its judgment the following:

‘THE COURT: *Well, he will be sentenced by this Court to serve 20 years on this charge.*’

But that was all.”

However, the quotation in Appellant’s brief is not all that was said at the time of sentence. We respectfully call the Court’s attention to remarks of the Court. (T.R. 42).

“THE COURT: He has been charged with a very serious offense in this Court. It is just an accident he is not here awaiting sentence to be executed. He is very lucky. He will be committed for nine years.”

While it is true that this was addressed to the co-defendant, the statement was made in the presence of the Appellant.

We also quote further remarks of the Court. (T.R. 43).

“THE COURT: Well, he will be sentenced in this Court to serve 20 years on this charge. Now, that may not mean anything. He probably will be out some other time kidnapping somebody else, or violate some other law. That is the Court’s judgment.”

We are unable to discover anything indefinite or ambiguous about the sentence in this case.

We have no quarrel with the principal of law that a prisoner is entitled to release when he has served his time less deductions for good conduct. The authority cited in Appellant’s brief (Page 12) goes no further than this.

We, therefore, submit that there is no merit to any of Appellant’s contentions and judgment of the District Court should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,  
United States Attorney  
for the District of Arizona

No. 12,933

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

WILLARD A. WINHOVEN,

*Appellant,*

VS.

EDWIN B. SWOPE, Warden, United  
States Penitentiary, Alcatraz, Cali-  
fornia,

*Appellee.*

BRIEF FOR APPELLEE.

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CHAUNCEY TRAMUTOLO,  
United States Attorney,

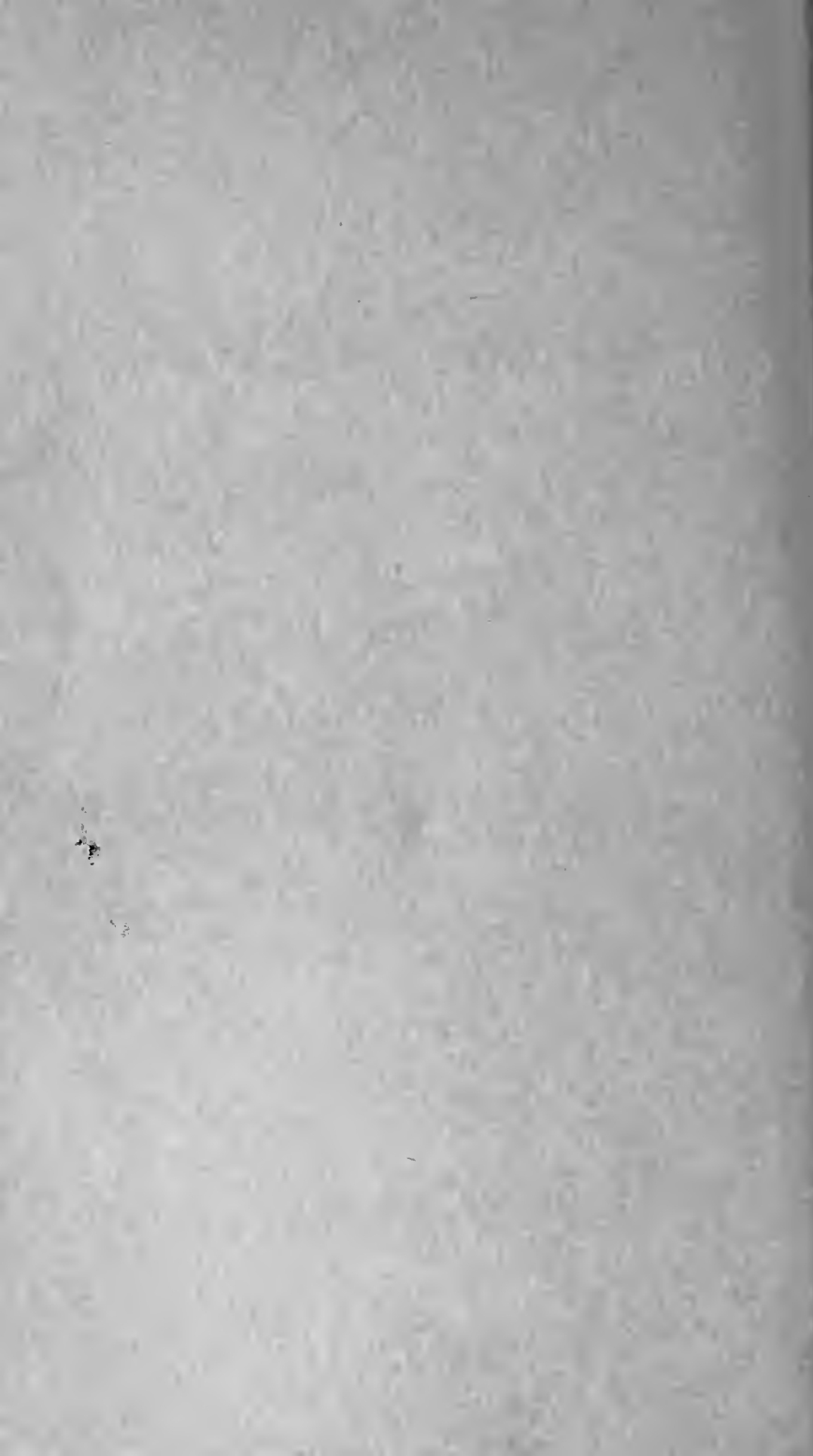
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*Attorneys for Appellee.*

FILED

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No. 12,933

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

---

WILLARD A. WINHOVEN,

*Appellant,*

VS.

EDWIN B. SWOPE, Warden, United  
States Penitentiary, Alcatraz, Cali-  
fornia,

*Appellee.*

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for a writ of habeas corpus (Tr. 65, 79). The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in which he contended that he was denied the effective assistance of counsel (Tr. 1-38), the Court below issued an order to show cause (Tr. 39), the appellee, the Warden of the said penitentiary, filed a return to order to show cause (Tr. 40-44) which the appellant traversed (Tr. 49-52), and the Court below thereupon ordered a writ of habeas corpus to issue (Tr. 57-58), which was duly issued (Tr. 59-60). Thereafter the appellant was produced before the Court pursuant to the said writ and the appellee filed a return to the writ of habeas corpus (Tr. 63-64), which the appellant traversed (Tr. 61-62). Thereupon the matter was submitted and the Court below entered the following "Order Dismissing Petition for Writ of Habeas Corpus":

"Upon the entry of appropriate Findings of Fact and Conclusions of Law,

It is hereby ordered that the Petition for Writ of Habeas Corpus be, and the same is, dismissed, and the Writ of Habeas Corpus is discharged:

The respondent may have ten days within which to submit his proposed Findings of Fact and Conclusions of Law.

Dated: February 13th, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."  
(Tr. 65.)

Thereafter the Court below entered the following "Findings of Fact and Conclusions of Law":

"The above entitled cause having been submitted by the parties hereto, Willard A. Winhoven, Petitioner herein, appearing in proprio persona, and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and Joseph Karesh, Esq., Assistant United States Attorney for the Northern District of California, appearing as counsel for respondent, and evidence both oral and documentary having been introduced, and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

#### FINDINGS OF FACT.

##### I.

That petitioner elected to proceed without counsel in these habeas corpus proceedings after he had been advised that the Court would appoint counsel for him if he so desired.

##### II.

That petitioner is a citizen of the United States.

##### III.

That petitioner is detained by the respondent, Edwin B. Swope, as Warden of the United States Penitentiary, at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in

criminal cause numbered 26543-W by the United States District Court for the Northern District of California, Southern Division, hereinafter called 'the Trial Court', on the 4th day of September, 1942, and under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 7785 by the United States District Court for the District of Kansas, First Division, on the 11th day of February, 1947, and transfer order dated the 20th day of March, 1947, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America.

#### IV.

That the Trial Court had jurisdiction over the petitioner and the offense alleged in the indictment returned against him in said criminal cause numbered 26543-W.

#### V.

That prior hereto petitioner herein filed in the Trial Court a motion to vacate judgment in said criminal cause numbered 26543-W, which was denied on the 21st day of June, 1949; that the petitioner did not take an appeal from the order of the Trial Court denying the said motion to vacate judgment; that the grounds set forth in said motion to vacate said judgment and sentence were in substance identical to those alleged in the petition for writ of habeas corpus filed herein.

## VI.

That the indictment in said case numbered 26543-W was returned by the Grand Jurors of the Trial Court on the 8th day of February, 1939; that the indictment in said criminal cause numbered 26543-W charged the petitioner and a co-defendant, John E. Sivyer, with unlawfully and feloniously assaulting and robbing a Post Office clerk of mail matter, money and other property of the United States and putting his life in jeopardy by use of a dangerous weapon.

## VII.

That the sentence imposed by the Trial Court against the petitioner and his co-defendant in said criminal cause numbered 26543-W, made and entered before the Trial Court on the 4th day of September, 1942, provided for the imprisonment of the petitioner and his co-defendant in a United States Penitentiary for a period of 25 years; that the sentence imposed by the United States District Court for the District of Kansas, First Division, in said criminal cause numbered 7785, made and entered on the 11th day of February, 1947, provided for his imprisonment in a United States Penitentiary for a period of five years; that the period of imprisonment imposed by the United States District Court for the District of Kansas, First Division, was ordered to run consecutively to the term of imprisonment imposed by the Trial Court; that petitioner has not as yet served the sentence imposed upon him by the Trial Court in said criminal cause numbered 26543-W; that with good time credits earned, the petitioner has served the sentence imposed upon

him by the United States District Court for the District of Kansas in said criminal cause numbered 7785; that the petitioner makes no attack against the validity of the sentence imposed against him by the Kansas Court, before which Court he was indicted and convicted of the offense of escape; that at the time the said indictment was returned against the said petitioner in said criminal cause numbered 26543-W the petitioner was in custody of the authorities of the State of California; that the first time the petitioner and his co-defendant appeared in the courtroom in response to the indictment returned against him in said criminal cause numbered 26543-W was on the 5th day of August, 1942, when he and his co-defendant were brought before the Court pursuant to a writ of habeas corpus ad prosequendum directed against the Warden of the California State Penitentiary, Folsom, Represa, California; that at the time the petitioner and his co-defendant first appeared before the Trial Court in said criminal cause numbered 26543-W the United States was represented by Valentine C. Hammack, Esq., Assistant United States Attorney; that at this proceeding on the 5th day of August, 1942, the said petitioner and his co-defendant were informed of the return of the indictment against them, were asked if they were the persons named in the said indictment, and upon answering that they were and that their true names were as charged, they were informed of the nature of the charges against them, stated that they understood the same, and waived the reading of the indictment; that during the proceedings on the arraignment the Court advised the petitioner and his co-defendant that before



pleading to the indictment they were entitled to be represented by counsel and that if they had no means to procure counsel the Court would appoint counsel to represent them; that the petitioner and his co-defendant having been asked whether they desired counsel assigned by the Court, replied that they were without means to employ counsel and that they desired to have the Court appoint counsel for them, and the Court thereupon appointed James B. O'Connor, Esq., as attorney for the petitioner and his co-defendant; that the Trial Court then ordered the case continued to the 8th day of August, 1942, to enable the petitioner and his co-defendant to plead, and thereupon remanded the petitioner and his co-defendant, in default of bail, to the custody of the United States Marshal for the Northern District of California.

### VIII.

That the Court, of its own volition, appointed able and competent counsel, James B. O'Connor, Esq., to represent the petitioner and his co-defendant; that petitioner's statement that the Assistant United States Attorney recommended to the Trial Court that James B. O'Connor, Esq., be appointed as counsel for the petitioner is not true.

### IX.

That thereafter, on the 7th day of August, 1942, the petitioner and his co-defendant appeared in Court represented by James B. O'Connor, Esq., the case, by consent of counsel being advanced from the 8th day of August, 1942; that at the request of Mr. O'Connor the matter was continued to the 22nd day of August, 1942, for entry of plea,

and thereafter to the 29th day of August, 1942; that on the 29th day of August, 1942, the petitioner and his co-defendant again appearing in Court with their counsel, James B. O'Connor, Esq., pleaded not guilty to the charges contained in the indictment and trial before a jury was set on the 1st day of September, 1942; that during the period from the 5th day of August, 1942, to the date of the entry of plea, and thereafter until the beginning of, and the culmination of the trial, Mr. O'Connor conferred on numerous occasions with the petitioner and his co-defendant.

## X.

That on the 1st day of September, 1942, the case proceeded to trial, the petitioner and his co-defendant being represented by counsel, James B. O'Connor, Esq.; that after the jury was duly impaneled the case was continued to the 3rd day of September, 1942, at 10:00 A.M.; that on the 3rd day of September, 1942, when the trial was first resumed, the co-defendant, Sivyer, for the first time requested permission to appear on his own behalf, and the permission of the Court was granted; that the petitioner did not then, nor had he prior to that time made such a request; that after counsel for the Government made an opening statement on behalf of the United States Mr. O'Connor waived an opening statement on behalf of the petitioner, and the co-defendant waived his opening statement; that after two witnesses had been called on behalf of the United States and testified the co-defendant moved the Trial Court to set aside its formal order allowing him to appear on his own behalf and to reappoint Mr.

O'Connor as his attorney, and after hearing, the said request was granted; that the Government and the defense rested at the close of the 3rd day of September, 1942, after the petitioner and his co-defendant had taken the stand and testified in their own behalf; that on the 4th day of September, 1942, Mr. O'Connor advised the Trial Court that the petitioner and his co-defendant desired to represent themselves in any further proceeding before the Court, and this request was denied; that up to this point petitioner had not protested the appointment of Mr. O'Connor as his counsel, nor had he, up to this time, requested that he appear on his own behalf; that thereafter the Assistant United States Attorney argued on behalf of the Government, Mr. O'Connor argued on behalf of the defendants, the jury retired to deliberate, and one hour and ten minutes later returned with verdicts of guilty against the petitioner and against his co-defendant; that the petitioner and his co-defendant were called for judgment, Mr. O'Connor made a motion for a new trial on behalf of the petitioner and his co-defendant, and also made a motion in arrest of judgment as to the petitioner and his co-defendant, and both motions were denied, whereupon the petitioner and his co-defendant were sentenced to terms of 25 years each in an institution to be designated by the Attorney General; that the petitioner did not appeal his conviction.

## XI.

That during the course of the trial petitioner and his co-defendant testified each on his own behalf.

## XII.

That at the time petitioner and his co-defendant were apprehended the co-defendant Sivyer confessed, in writing, his guilt to a United States Post Office Inspector; that in the said statement the co-defendant stated that the petitioner was likewise guilty of the offense and indicated the method of participation by petitioner in the commission of the said offense; that in the presence of the co-defendant the said United States Post Office Inspector read the co-defendant's statement to the said petitioner, and the said petitioner, after being advised that he did not have to speak, freely and voluntarily admitted that the contents of the statement given by the co-defendant were true; that during the course of the trial the said Post Office Inspector testified as to what had transpired between himself and the petitioner and the co-defendant with relation to petitioner's oral confession of guilt and the co-defendant's written confession of guilt.

## XIII.

That the petitioner has failed to sustain the burden of proving that the Trial Court and Mr. O'Connor did not adequately protect all rights of the petitioner with reference to any evidence offered or received against him.

## XIV.

That at no time during the entire proceedings before the Trial Court did the petitioner, either orally or in writing, object to having the trial together with the co-defendant.

## XV.

That the petitioner has failed to sustain the burden of proving that there was a conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## XVI.

That there was no conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## XVII.

That Mr. O'Connor, who is now deceased, gave the petitioner and his co-defendant his undivided attention and represented them in his usual able and competent manner, protecting all of their rights to which they were entitled.

## XVIII.

That petitioner was not denied the right of assistance of counsel, or the effective assistance of counsel at any time during the course of the proceedings before the Trial Court, and was then and there duly represented by counsel and given the effective assistance of counsel during the course of the proceedings before the Trial Court.

## XIX.

That the petitioner has failed to sustain the burden of proving that he was denied the right of assistance of counsel or the effective assistance of counsel for his defense at any time during the course of the proceedings before the Trial Court.

## XX.

That the Clerk of the Trial Court has maintained his minute and docket entries of all of the proceedings; that the reporter's transcript of the proceedings for the 3rd and 4th days of September, 1942, has been destroyed.

## XXI.

That petitioner, prior to his conviction in said criminal cause numbered 26543-W, had a record of felony convictions.

## CONCLUSIONS OF LAW.

## I.

That the petitioner has failed to sustain the burden of proving that there was a conflict of interests between the petitioner and his co-defendant.

## II.

That there was no conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## III.

That petitioner has failed to sustain the burden of proving that he was denied his right of counsel, or the effective assistance of counsel before the Trial Court.

## IV.

That petitioner was not denied the right of assistance of counsel, or the effective assistance of counsel before the Trial Court.

## V.

That petitioner was effectively, efficiently, and ably represented by counsel during all stages of the proceedings before the Trial Court.

## VI.

That the petitioner has failed to sustain the burden of proving he was denied any of his constitutional rights before the Trial Court.

## VII.

That the petitioner was not denied any of his constitutional rights before the Trial Court.

## VIII.

That petitioner has not sustained the burden of proving he was denied due process of law before the Trial Court; that petitioner was not denied due process of law before the Trial Court.

## IX.

That there is no merit to the petition for writ of habeas corpus on file herein.

## X.

That petitioner is now in the lawful custody and control of the respondent, and is not now entitled to his discharge from the United States Penitentiary at Alcatraz, California.

Dated: April 9, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."

(Tr. 69-78.)

At the time the findings were entered the Court below entered a "Final Order", reading as follows:

"For the reasons set forth in the Findings of Fact and Conclusions of Law filed herein,

It is, therefore, now ordered, adjudged and decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and that the petition for writ of habeas corpus herein be, and the same is hereby, dismissed, and the petitioner is hereby ordered remanded to the custody and control of the respondent.

Dated: 9th April, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."

(Tr. 79.)

From this latter order appellant now appeals to this Honorable Court (Tr. 80-84).

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### QUESTION.

Was the appellant denied the effective assistance of counsel?

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### CONTENTION OF APPELLEE.

The answer to the above stated question is: No.



**ARGUMENT.**

The appellant, with a record of felony convictions, contends, in reliance on

*Glasser v. United States*, 315 U.S. 60,

that he was denied the effective assistance of counsel because the interests of himself and his co-defendant conflicted and the same attorney was appointed to represent them both.

The basis of the alleged conflict is that appellant's co-defendant had given a statement implicating himself and appellant, and that the co-defendant took the witness stand and repeated the statement of appellant's involvement in the crime.

It is undisputed that the co-defendant gave a statement in which he confessed his guilt and involved the appellant, but the allegation of appellant that his co-defendant, who took the stand as a witness, testified against him during the trial, is not supported by the record in the habeas corpus proceedings. The reporter's notes of the trial occurring about a decade ago have been destroyed in accordance with the usual practice, and the Court below refused to accept appellant's version of what occurred at the trial.

The Court's order denying the petition for writ of habeas corpus is strengthened by the testimony of a postoffice inspector, to the effect that the appellant, shortly after his arrest, admitted that the contents of the co-defendant's statement involving him were true. This testimony was denied by the appellant, but the Court below refused to believe him.

In order to prevail the appellant is compelled to show that during the course of the trial certain things occurred as a result of the representation by his counsel of the co-defendant resulting in prejudice to him. This he has failed to do, and accordingly, his position cannot be sustained. See the following decisions of this Honorable Court:

*Danziger v. United States*, 161 F. (2d) 299, 301;

*Swope v. McDonald*, 173 F. (2d) 852, 856.

Furthermore, the Court below found, contrary to the testimony of the appellant, that he made no protest with relation to the appointment of counsel to represent him and the co-defendant. This, too, is a factor to be considered in the light of further decisions of this Honorable Court, interpreting the *Glasser* case, *supra*. See

*Johnston v. McDonald*, 157 F. (2d) 275, 276;

*Newagon v. Swope*, 183 F. (2d) 340, 341.

The Court below found, after hearing, that there was no conflict of interests between the appellant and the co-defendant during the trial before the trial Court, and that appellant had failed to sustain the burden that there was such a conflict. The Court below further found that appellant's trial counsel, now deceased, "gave the petitioner and his co-defendant his undivided attention and represented them in his usual able and competent manner, protecting all of their rights to which they were entitled". There is nothing in this record and the law applicable thereto, and more particularly the decisions of this Honor-

able Court, as aforesaid, to warrant a setting aside of these findings.

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**CONCLUSION.**

In view of the foregoing, it is respectfully urged that the order of the Court below denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,  
September 21, 1951.

CHAUNCEY TRAMUTOLO,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

*Attorneys for Appellee.*





